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LDRC LIBELLETTER

Reporting Developments Through July 23, 1998

In this Issue . . .

LIBEL

CBS Gets Costs in Texas, p. 3
Anonymous Speak Outs Protected, p 3.
Joan Lunden's Ex Not Public Figure, p. 5
Egg Disparagement Suit Dropped, p. 7
Brawley "Advisers" Lose Suit in New York, p. 8
Hawaii on Opinion and Sanctions, p. 9
America's Most Wanted Wins in Tennessee, p. 11
Libel-Proof & Substantial Truth Win in Texas, p. 13
Cover v. Publication Date: Statute of Limitations, p. 20

NEWS AND UPDATES

Illinois High Court to Hear Mancow Muller Suit, p. 15
Chiquita Sues Ex-Enquirer Reporter, p.16
Emotional Distress Claim Upheld in Radio Suit, p. 19
U.S. v. Mathews: Investigating Porn on the Net, p. 21
Martin Luther King Speech in Public Domain, p. 41

INTERNET

State Regulation v. Commerce Clause, p. 23
Canada Orders Net IDs revealed, p. 25
British Plaintiff Sues U.S. ISPs in London, p. 26

INTERNATIONAL

Supreme Court Justices Will Accept Euro Court Cites, p. 25
Dow Jones Wins UK Forum Non Conveniens Motion, p. 27
Linford Settles: Distributor Issues Not Decided, p. 29
Canada: Poll Reporting Restrictions Invalid, p. 31

STARR/CLINTON/JONES WATCH AND ACCESS

Update on Starr Grand Jury Access, p. 33
Media Efforts in Jones v. Clinton, p. 34
Barring Commercial Access to Public Information Invalid, p. 37

PUBLISHED BY THE

LIBEL DEFENSE RESOURCE CENTER

404 Park Avenue South
16th Floor
New York, NY 10016
(212) 889-2306

Chiquita Files Suit Against Former *Cincinnati Enquirer* Reporter, page 16

Martin Luther King, Jr. "I Have A Dream" Speech Held to Be in Public Domain, page 41

Dow Jones Wins On Forum Non Conveniens in UK Libel Suit, page 27

Jury Awards $525,000 in Maine Trucking Case Against NBC

Finding that reporters and staff from NBC mislead the owners of a Maine trucking company and an employee into participating in a story on the trucking industry, a federal jury in Maine awarded the plaintiffs damages totaling $525,000 on claims of negligent and fraudulent misrepresentation, in addition to defamation, false light invasion of privacy and emotional distress claims. Owners of Classic Carrier Trucking Company, Raymond and Kelly Veilleux, and trucker Peter Kennedy sued NBC and the producer and correspondent over two investigative reports aired on *Dateline NBC* in 1995. The jury deliberated approximately 10 hours before returning the verdict against the defendants. *Veilleux v. NBC*, Civ. No. 97-CV-B.

Plaintiffs' Claims of Promises Made

The plaintiffs, Raymond and Kathy Veilleux, owners of Classic Carriers trucking company, and their employee, truck driver Peter Kennedy, alleged *Dateline* representatives persuaded them to participate in the story based on

(Continued on page 2)

Jury Awards $525,000 in Maine Trucking Case Against NBC

(Continued from page 1)

assurances that the report would show the "positive side" of the trucking industry. Along with the alleged assurance of a positive piece, the plaintiffs claimed the defendants also told them that the story would not include Parents Against Tired Truckers (PATT), an organization advocating more stringent trucking regulations. Veilleux allowed NBC to bring its cameras along on a coast-to-coast haul with Kennedy as the driver. NBC maintained it only promised the plaintiffs an accurate description of the trip.

Instead of the "positive" portrayal expected by Veilleux, the broadcast stories were investigative reports addressing the stresses of long-haul truck driving, including "hours of service" violations and driver fatigue, and featured representatives from PATT. The reports also revealed that Kennedy tested positive for amphetamine and marijuana use in a drug test administered before his road-trip with reporters, and was fired as a result. *Dateline* also alleged that Kennedy violated several other safety and service regulations during the journey.

A Heavy Mix of Experts

The trial consumed approximately 12 days during a three-week period and included testimony on the plaintiffs' side from the plaintiffs, an accountant, a toxicologist (about the drug test results), a videographer from Portland (who, according to a newspaper account, testified about what he saw as evidence of staging by defendants and their pressure on Kennedy to discuss his drug test results), a cardiologist, and by deposition, a trucker who had spoken to *Dateline* prior to *Dateline's* accompanying Kennedy on his cross-country trip.

Among the witnesses for the defense were the two named defendants, independent producer Alan Handel and senior correspondent Fred Francis; the executive producer of *Dateline,* Neal Shapiro; an associate producer; the owner of a Florida company which leased Veilleux's trucks at the time of the broadcasts, a toxicologist, and an economist; and by deposition, a social worker who spoke with Kennedy about his drug test, and others involved in the drug testing, and the safety director of the Florida trucking firm.

The Verdict

While the focus of the trial centered on the charges of negligent and intentional misrepresentation, the claims submitted to the jury also included negligent infliction of emotional distress, defamation (eighteen statements were presented to the jury), false light, invasion of privacy and loss of consortium. NBC was found liable on all claims except with respect to five of the defamation claims.

The jury found defendants NBC, Francis, and Handel negligently supplied false information and intentionally made false representations of material fact to plaintiff Veilleux regarding the story the network intended to produce with the purpose of inducing Veilleux's participation, and that Veilleux justifiably relied on those representations, suffering pecuniary harm as a result. Veilleux claimed that three of his major clients stopped doing business with him shortly after the program aired, resulting in revenue losses close to $250,000. Veilleux and Kennedy, it was found, suffered emotional distress as a result of negligent misrepresentation.

Among the statements the jury held to be defamatory toward both defendants were: "almost every time [Kennedy] goes to work he breaks the law," and "in just under six days, he has slept only twenty-one hours, an average of three-and-a-half hours a day . . . [Peter Kennedy] has broken the law, put himself and others at risk through dangerously long hours." The defendants were held liable for other statements which similarly pertained to violations made by Kennedy in falsifying log books and driving without sleep.

Statements found false and defamatory only to Kennedy were: "as Kennedy heads east through Utah, all the inspection stations on the trip east have been closed. He's escaped any scrutiny, and as far as he's concerned, none is needed," and, as said to Veilleux, "[Kennedy] didn't take the required time off. He made the log up as he went along so he would look legal."

Veilleux was awarded $150,000 for pecuniary or actual

(Continued on page 3)

Jury Awards $525,000 in Maine Trucking Case Against NBC

(Continued from page 2)

monetary loss, $50,000 for physical injury and emotional distress, including mental suffering and embarrassment, and $100,000 for reputational damages, totaling $300,000. Veilleux's wife, Kelly, was awarded $50,000 on her loss of consortium claim. For his claims of negligent infliction of emotional distress, defamation, invasion of privacy, and false light, Kennedy was awarded a total of $175,000, $100,000 in damages for emotional distress and mental suffering, and $75,000 in reputational damages. The jury did not distinguish between the defendants in assessing liability or damages. The judge had dismissed claims for punitive damages prior to trial. (*See LDRC LibelLetter*, June 1998 at p. 11.) NBC has until mid-August to decide whether to appeal.

Fifth Circuit Affirms Award of Costs to CBS After Texas Libel Win

On July 17, 1997, the Fifth Circuit affirmed the award of $85,000 in court costs against the unsuccessful libel plaintiffs in the Kastrin family. After the federal court jury found that CBS *60 Minutes* broadcast "The Other America" was true last August, Judge David Briones taxed all of the court costs requested by CBS. The Kastrins did not appeal the jury verdict, but did appeal the award of court costs, and then filed a supersedeas bond to avert post-judgment discovery. In a per curiam opinion, the Fifth Circuit held that the district court did not abuse its discretion in awarding these costs.

The costs awarded included those for subpoenas, witness and deposition fees, and substantial costs incurred for trial exhibits and duplication. CBS intends to seek its costs for the appeal as well.

Anonymous Reader "Speak Outs" Protected

By Sanford Bohrer

Is it opinion to call the head of the local power company a liar who harasses and otherwise mistreats the employees? Is it actual malice to publish anonymous phone call messages making those allegations without doing anything to verify them? A United States District Judge in Florida has held that the unchecked and unverified publication of multiple anonymous telephone messages to a newspaper calling the general manager of the local electrical cooperative a liar and characterizing him as a bad manager who harassed and mistreated employees in half a dozen ways is protected opinion and even if factual does not constitute knowing or reckless publication of a falsehood. *Higgenbotham v. Independent Newspapers*, Case No. 97-82-CIV-FTM-17D (M.D. Fla. 4/28/98)

Speak Outs

Two community newspapers owned by Independent Newspapers, Inc., which publishes community newspapers in four states, including nine in Florida, published the statements at issue in their opinion sections in a section called "Speak Out." Independent's community newspapers, including these two, do not take editorial positions on any issues, but provide the opinion sections as community forums.

The top of the section states:

> This is the opinion page. All opinions expressed by letter writers or columnists are their opinions. The purpose of the opinion page is to provide a forum for free and robust debate for our readers. The [newspaper] seeks to stimulate and facilitate the expression of opinions by members of the community. The newspaper has no editorial opinion on any topic.

The Speak Out section says, in relevant part, "Unlike letters to the editor, Speak Out is designed for anonymous expressions of opinions. We edit calls for brevity, relevance and fairness."

A Local Controversy

The Speak Outs at issue came in the context of a proposed consolidation of the local electrical cooperative, a customer-

(Continued on page 4)

Anonymous Reader "Speak Outs" Protected

(Continued from page 3)

owned electricity provider common in rural areas of the state and country. The local cooperative proposed to consolidate with another cooperative nearby. At roughly the same time, the local cooperative was trying to cut costs and become more efficient in ways other than consolidation. The general manager became the lightning rod for everything relating to the consolidation. The consolidation never took place and the general manager lost his job and sued the newspapers for defamation in federal court in Ft. Myers, Florida.

The Speak Outs were called in, typed up, and published without editing. They said the following about the general manager: he lied to the employees, misled them, overworked them, fired people without cause, would retaliate against workers expressing opinions differing from his, engaged in psychological warfare on employees, treated employees in a demeaning manner and with little respect, harassed employees, and was so good at the "hatchet job" he was hired to do that "Hitler would have made him a four star general."

The magistrate judge entered a 25-page decision recommending summary judgment for the newspapers. The plaintiff conceded the consolidation issue was one of public concern, and the judge concluded each of the Speak Outs, in context, related to consolidation. The judge also held, using the standard approach, that the general manager was a limited purpose public figure. None of these holdings was remarkable in the factual context before the court. The key issues were opinion and actual malice.

Were They Opinion?

On the opinion issue, although to some people whether someone lied or not or harassed or mistreated employees was susceptible of being proven true or false or objectively verifiable, the judge held each of the statements was pure opinion. The obvious "rhetorical hyperbole" aside, the judge used an analysis which emphasized two aspects of the **context** in which the Speak Outs appeared: (1) the news coverage of consolidation and the general manager's role (none of the suit was based on anything published in the news section of the newspapers), and (2) the location in the papers including the Speak Outs and the cautionary language on those pages (the opinion pages).

The judge noted opinion is pure if it is based on facts disclosed by the communicator or on facts "that are otherwise known or available to the reader or the listener as a member of the public," and found the Speak Out statements at issue were based on such facts. The judge pointed to news articles as "a background" for the Speak Outs, including references to interviews of the general manager published in the news articles. And the judge stressed the manner in which the newspapers presented the Speak Outs: "It is clear in both papers that the Speak Outs printed are the anonymous opinions of the callers and not the opinions of the newspapers. The cautionary words are very clear...the Speak Out is printed in the opinion section of the paper and not with news articles." Thus, the judge found each of the repeated instances of calling the general manager a liar was pure opinion. *Milkovich* was cited in the parties' summary judgment papers but not mentioned by the judge.

No Actual Malice

On the actual malice issue, the facts showed the editor of the newspaper, the only one to review the Speak Outs before publication, was personally opposed to consolidation, having spoken at a county commission meeting on the subject, and did nothing to determine the accuracy of anything in the Speak Outs. She testified she did not care whether the statements were true or not. She simply had the anonymous calls typed up and published. The editor was fired suddenly and unexpectedly by the newspaper during the lawsuit, before she signed a declaration to be used for the motion for summary judgment. Thus, the only testimony from her on the motion for summary judgment was her deposition examination by plaintiff's counsel.

The judge held the editor's conscious ignorance of the facts and failure to investigate were not sufficient to find actual malice and the anti-consolidation feelings of the editor were not directed against the general manager personally. The judge noted that although the editor had no idea whether anything in the Speak Outs was true or false, she claimed she had received a number of calls saying "the same thing."

No appeal was filed.

Sanford Bohrer is with the firm Holland & Knight LLP in Miami, FL. which represented the defendant in this matter.

Joan Lunden's Ex-Husband is Not a Public Figure

New York's *Chapadeau* Protection Also Denied

Glossing over repeated evidence in the record of plaintiff's prominent and visible role in promoting both his and his wife's career, New York's Appellate Division, First Department reversed a trial court finding that plaintiff was a public figure and the grant of summary judgment for defendant, Globe International. *Krauss v. Globe International Inc.*, N.Y.L.J., June 25, 1998, at 26 (N.Y. App Div. June 25, 1998) No. 92-2245, 1998 N.Y. App. Div. LEXIS 7372. Globe's magazine, *The Globe*, published an article in March 1992, stating that Joan Lunden's husband, Michael Krauss, had an "encounter" with a prostitute at a Philadelphia hotel shortly before the couple announced that they were separating. Joan Lunden was, for over a decade, the co-host of ABC's *Good Morning America*, as well as the talent in numerous syndicated programs, and author of books and columns.

Further, in a dangerously crabbed application of the principle set twenty-four years ago in *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196 (1974) -- that a publisher will be found liable for a statement on an issue which is "arguably within the sphere of legitimate public concern" only if the publisher has acted with "gross irresponsibility"-- the appellate court held that the same standards it used to determine whether plaintiff was a public figure and engaged in a public controversy were applicable to a finding under *Chapadeau*. In so doing, it denied *Chapadeau* protection to the *Globe* article.

Michael Krauss Gave Numerous Interviews to the Press

While the appellate court opinion is low on factual background, the trial court did recite the facts on which it based its finding. *Krauss v. Globe International Inc.*, 25 Media L. Rep. 1082, 1087 (1996). Krauss married Joan Lunden in 1978. In 1980, Lunden became co-host of ABC-TV's morning news program, *Good Morning America*. In 1981 Krauss began his own production company, Michael Krauss Productions. Krauss produced several syndicated television programs in which Lunden was featured -- in fact, Michael Krauss Productions was devoted almost entirely to programs featuring his wife -- and he regularly appeared on two of their nationally broadcast programs, *Mother's Day* and *Mother's Minutes*. The trial court noted that the central topics in all of the Krauss/Lunden programming were marriage and family issues (as were the topics of several books that Krauss wrote under Lunden's name and the column he co-wrote with her). In connection with these programs he gave numerous interviews to the press, resulting in substantial coverage mentioning Krauss's name. ABC also used publicity photos of Krauss to promote the programs. In 1980 Krauss won the Award for Cable Excellence for producing *Mother's Day* and the Parent's Choice award from *Parent's Choice* magazine. In 1984, Joan Lunden published an autobiography entitled *Good Morning, I'm Joan Lunden*. The book mentioned Krauss frequently and contained photographs of him and his family.

The Globe Receives a Phone Call

In February 1992, Bob Michals, a senior editor at *The Globe*, received a phone call from the manager of an escort service in the Philadelphia area. The source indicated that he was the manager of a prostitute who stated that she had a paid "encounter" with Krauss in 1991. This call came just one month after Lunden and Krauss had announced that they were separating and sharing custody of their children. The source asked for $10,000 for exclusive rights for the story. Michals, working with Ken Harrell, another senior editor at *The Globe*, contacted the "manager" and arranged to meet with the prostitute, a woman by the name of Sharon Brubaker, at the Wyndham Hotel in Philadelphia. With a tape recorder running and Harrell taking notes, the men spent the afternoon with Sharon Brubaker, who gave the reporters the details of the encounter with Krauss.

Michals and Harrell Investigate

Michals and Harrell attempted to verify that Brubaker had in fact had an encounter with Michael Krauss. The reporters conducted a "photo line-up." They took several photographs from *The Globe's* files of individuals that re-

(Continued on page 6)

Joan Lunden's Ex-Husband is Not a Public Figure

(Continued from page 5)

sembled Krauss in height, weight and physical appearance. Michals and Harrell then showed the photographs to Brubaker and asked her to pick out Krauss. Michals and Harrell contended that Brubaker chose Krauss every time. They asked Sharon Brubaker to submit to two polygraph tests which, with the exception of one question, she passed.

Krauss is Not a Private Figure under Firestone Analysis

The New York Supreme Court rejected Krauss's reliance on *Time, Inc. v. Firestone*, 424 U.S. 448 (1 Media.L.Rep. 1665) (1976) for the proposition that he was a private figure. The court said, the socialite plaintiff-Firestone had never sought publicity, either in the local or national press, prior to her divorce proceeding. She was compelled, involuntarily, to appear in court to "obtain legal release from the bonds of matrimony." *Krauss v. Globe International, Inc.*, 25 Media L.Rep. 1082, 1086 (1996) (citing *Time, Inc. v. Firestone*). The court noted that *Firestone* does not stand for the proposition that public figures involved in divorce proceedings and other personal disputes have a special haven within libel law, indicating that "marital or family disputes of public figures are legitimate subjects of public attention." *Krauss v. Globe International Inc.*, 25 Media L. Rep. 1082, 1086, n.3 (1996).

Krauss is a Public Figure in his Own Right

At the lower court level, Judge Arber found that Krauss was a public figure in his own right. "He came to the attention of the public not by involuntary participation in divorce litigation, but through his own voluntary efforts to publicize and promote himself, his wife, their careers and their family lifestyle." *Krauss* at 1087. Nor was the judge persuaded by Krauss's argument that his personal life was "inherently private." *Id.* While Lunden and Krauss were married, they continuously and successfully promoted their books, television programs and videotapes through interviews with the press. At the very least, the judge noted, Krauss was a limited-purpose public figure because he met the test set out in *Lerman v. Flynt Distributing Co. Inc.*, 745 F.2d 123, 136-37 (10 Media L.Rep. 2479) (2d Cir. 1984). "A limited-public purpose figure is one who has: (1) successfully invited public attention to his views in an effort to include others prior to the incident that is subject of litigation; (2) voluntarily injected himself into a public controversy related to the subject of the litigation; (3) assumed a position of prominence in the public controversy; and (4) maintained regular and continuing access to the media." *Krauss v. Globe International Inc.*, 25 Media L. Rep. 1082, 1087 (1996) (citing *Lerman v. Flynt Distributing Co. Inc.*).

Public Controversy Need Not Be Hard News

Citing *Lerman*, the New York Supreme Court held that the "public controversy" doctrine encompasses "any topic on which sizable elements of society have different, strongly held views." *Id.* Both Krauss and Lunden had for many years sought the attention of the press with respect to their views on marriage and family life. Both of them had attained a level of cognizance within their field and had regular and continuing access to the media to promote their views on marriage and family life. That the controversy was not political or "hard news" did not take the matter outside the scope of public controversy. Having determined that Krauss was in fact a public figure, the New York Supreme Court went on to grant summary judgment for defendants on the issue of actual malice.

Appellate Division Disagrees -- Article was "Mere Gossip"

In an opinion notable for its lack of citations to the evidence presented at the lower court level, the appellate court contended that Krauss was not "famous in his own right" and that he was neither a public figure nor a limited-purpose public figure for the purposes of the article in dispute. Not only was Krauss not found to be a public figure, the court added that his alleged affair was not even "arguably within the sphere of legitimate public concern." N.Y.L.J., June 25, 1998, p. 26, col.5. The court called the article " a lurid story" that was "mere gossip" and maintained that the "question of whether [Krauss] was faithful to his wife during their marriage, was of interest to readers of defendant's publication because plaintiff's wife was a television celebrity, and not because of plaintiff's attitudes on family values or child

(Continued on page 7)

Joan Lunden's Ex-Husband is Not a Public Figure

(Continued from page 6)

rearing." *Id.* Because the appellate court reasoned that Krauss was not a public figure, the court's analysis stopped short of reaching the issue of actual malice and found instead that a triable issue existed as to negligence.

Using the same standard, and finding "no viable rationale" under which defendant's "strained attempt" would "transform the subject matter of their article from mere gossip to public controversy," the Appellate Division also rejected that the report was "arguably within the sphere of legitimate public concern," a concept that was established twenty-four years ago in *Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199 (1974). N.Y.L.J., June 25, 1998, p.26, col.5. Under the standard set out in *Chapadeau*, a plaintiff must prove "gross irresponsibility" on the part of a publisher with regard to a statement that is "arguably within the sphere of legitimate public concern."

Family Relationships and Public Figures

There is additional authority for the proposition that familial relationships may generate prominence that leads to a public figure determination. *See Meeropol v. Nizer*, 56- F.2d 1061, 2 Med.L.Rptr. 2269 (2d Cir. 1977), *cert. denied*, 434 U.S. 1013 (1978) (children of Julius and Ethel Rosenberg); *Carson v. Allied News Co.*, 529 F.2d 206 (7th Cir. 1976) (wife of entertainer); and cf., *Rosanova v. Playboy Enters., Inc.* , 411 F.Supp.

Brewer v. Memphis Publishing Co., 6 Media L.Rep. 2025 (1980) looked at the issue from an interesting, and commonsensical fashion. In that decision, the question was whether a woman who had been referred to in a news article as Elvis Presley's "number one girl"was a public figure. The newspaper reported that the woman, who may have been Presley's "number one girl" in 1957 but who had subsequently married, had a "reunion" with the entertainer while she was in Las Vegas. Brewer, the husband of the woman, and his wife brought suit against the publisher but failed to prove "actual malice" on the part of the newspaper. Brewer, like Krauss, had asserted that he was neither a public figure or a limited-purpose public figure. He attempted to argue that his fame as a football player had no relationship to the article about his wife and that the lower negligence standard should apply. But the Fifth Circuit disagreed. "To hold that [the husband] might . . . recover on a showing of negligence [as a private figure] would . . . strip the required protection from the press to write [the] story about [the wife]." *Id.* at 2041. 440 (S.D. Ga. 1976) *aff'd.* 580 F.2d 859 (5th Cir. 1978) (plaintiff's associations with organized crime figures made him a public figure).

Globe is seeking leave to take the case to the New York Court of Appeals.

Egg Disparagement Claim Dropped

In what otherwise portended to be one of the early cases testing the newly adopted agricultural disparagement cases, plaintiff has filed a notice of voluntary dismissal. Buckeye Egg, formerly AgriGeneral Co., sued Ohio Public Interest Research Group (PIRG) and its director, Amy Simpson, in Ohio state court asserting claims under the Ohio agricultural disparagement statute and for common law disparagement. The claims arose out of a press conference at which Ohio PIRG announced the litigation brought in Ohio federal court against Buckeye Egg by Ohio PIRG and Equal Justice Foundation over allegations that Buckeye Egg illegally denied overtime payment to workers in its plants and fraudulently recycled eggs whose freshness dates had expired into cartons with new expiration dates.

A lawyer for Buckeye Egg was reported in the July 7, 1998 issue of USA TODAY as saying that the disparagement suit was dropped because it was not worth the effort to pursue defendants with such limited resources and no insurance. LDRC believes that it was because David Marburger of Baker & Hostetler in Cleveland was representing the defendants!

In any event, the result is that the possible challenge to this Ohio statute will have to await another lawsuit.

Verdict for Plaintiff in Brawley Trial: Jury Now Considering Damages

After nearly eight months of trial and five days of deliberations, a jury in upstate Poughkeepsie, New York found that the Reverend Al Sharpton, C. Vernon Mason and Alton Maddox knowingly lied or recklessly disregarded falsity on numerous occasions when they accused Steven Pagones, a former assistant district attorney, of being one of several white men who kidnapped, raped and tortured Tawana Brawley in 1987. Brawley made her racially explosive rape charge through her family and so-called advisers, Sharpton, Mason and Maddox, a charge which a 1988 special state grand jury investigation found was a complete hoax. *See LibelLetter* 1/98 at 11.

While the result may not close the book on an incident which has come to symbolize complex racial politics in the area, it was a success for Pagones, who filed suit ten years ago to clear his name. On two occasions when Pagones was accused by Sharpton of attacking Brawley, he was essentially challenged to sue if he disputed the truth of the accusations.

Damage Hearing Underway

The jury is now considering the amount of damages to award. The jury will also consider what damages to assess against Tawana Brawley, who never responded to Pagones' suit and was found in 1991 to have defaulted. The defendants did not call Brawley as a witness. Mason, however, asked that Brawley be allowed to testify for defendants at the damage phase. Although the court granted this unusual request, Brawley was a no-show on the day she was to appear.

The Jury's Findings

The jury found for Pagones on 10 out of 22 defamation claims. They rejected a claim that the defendants conspired to defame him. The panel of six jurors worked through a thirty-four page special verdict form that asked of the alleged defamations 1) whether the statement had a defamatory meaning; 2) whether it was "of and concerning" Pagones; 3) whether the statement was published to a third party; 4) whether Pagones proved falsity; 5) whether Pagones proved knowledge of falsity, and, separately; 6) whether Pagones proved reckless disregard of truth or falsity.

Sharpton was found to have defamed Pagones on seven occasions, twice with knowledge of falsity and five times with reckless disregard. Maddox defamed Pagones with two statements, one of which was reckless; the other, made with knowledge of falsity. Mason was found to have knowingly lied about Pagones at an appearance at Harvard Law School in 1989 when six months after the grand jury investigation declared Brawley's claim a hoax he stated accused Pagones of attacking Brawley.

Of the 12 rejected claims, seven statements were found not to have a defamatory meaning and jurors deadlocked four times on this issue. Maddox was found to have knowingly lied when he accused Pagones of knowing Brawley and having "eyed" her before the alleged rape, but Pagones failed to prove special damages with regard to this statement, the only claim on which he was required to do so.

A Long Trial

The lengthy trial began in December 1997. In an unusual pretrial decision, the court ruled that the defendants were estopped from proving truth because of the grand jury's findings. Two weeks into trial, however, the court backed away from this ruling and allowed defendants wide latitude to examine the question of truth. This permitted defendants to each engage in lengthy witness examinations which contributed both to the length of the trial and a perception that the trial judge had lost control over the case. Pagones testified for 24 days, most of that time on cross-examination.

The case was interrupted several times by shouting matches instigated by defendants and charges by them that the judge and plaintiff's counsel were racists. One defense attorney was cited for contempt three times, the last time being sentenced to spend a night in jail.

Unusual Appeal Issue Raised

At a press conference after the jury verdict, Michael Hardy the attorney for Al Sharpton, vowed an appeal on the ground that the special verdict form's separation of actual malice into two separate questions, one on knowledge of falsity and the other on reckless disregard, provided plaintiff with "two bites at the apple." Although this sort of explicit bifurcation on the actual malice question may be unusual, it does not seem to be a strong basis for appeal. Other reports have speculated that the defendants may, in any event, not be willing or able to pay for the estimated $75,000 to copy the lengthy trial transcript in order to appeal.

HAWAII SUPREME COURT UPHOLDS DISMISSAL AND SANCTIONS

"Rape" Charge is Rhetorical Hyperbole

By Charles D. Tobin

The Hawaii Supreme Court has upheld dismissal, and an award of sanctions against plaintiffs' lawyer, in a bitterly contested libel lawsuit that stemmed from a newspaper quote of entertainer George Harrison.

The Court, on grounds the quote was "rhetorical hyperbole," affirmed summary judgments rendered by the trial court in favor of Gannett Pacific Corp., owner of *The Honolulu Advertiser*, and the former Beatle. *Gold and Whitney v. Harrison, et al.*, slip op., No. 20468 (Hawaii July 8, 1998). In so doing, the court addressed for the first time post-*Milkovich* the standard in Hawaii for distinguishing defamatory speech from protected expression, adopting the three-part test from the Ninth Circuit decisions in *Fasi v. Gannett Co., Inc.* 930 F. supp. 1403, 1409 (D. Hawaii 1995), *aff'd*, 114 F.3d 1194 (9th Cir.). *cert. denied*, ___ U.S.___ 118 S. Ct. 302 (1997) and *Partington v. Bugliosi* 56 F.3d 1147, 1153 (9th Cir. 1995).

"The Whole Issue is My Privacy"

After Harrison built a home on Maui, the libel plaintiffs were among the group of neighbors who filed a lawsuit to establish an easement over his land, alleging that they had traditionally walked a path across the property to reach the beach. Harrison defended, in part, on grounds that permitting the easement would invade his privacy, since beach goers traversing the land could peek in his windows. In July 1993, the trial court ruled against Harrison and held that his neighbors had proven their easement claim.

When he emerged from the courtroom after the judge announced the ruling on the easement claim, a disappointed Harrison spoke with the press. The following day, *The Advertiser* reported, in an article headlined, "Ex-Beatle says of trial on Maui: Don't rob my privacy, no, no, no", that Harrison had said:

> "Have you ever been raped? I'm being raped by all these people. . . . My privacy is being violated. The whole issue is my privacy."

The libel plaintiffs — the only two of the group of Harrison's easement opponents to pursue a defamation action — were not mentioned by name in *The Advertiser's* article. They quickly filed a libel lawsuit in Federal court against Harrison alone, but they dismissed that action within a few months. Two years later, in July 1995, they refiled in state court, this time naming not only Harrison as a defendant, but the newspaper as well.

Dismissed by the Trial Court

Plaintiffs' renewed lawsuit, claiming libel, false light, emotional distress and negligence (as well as slander by Harrison), asserted the quote — that the easement litigation made Harrison feel "raped" — accused plaintiffs, in the words of their libel complaint, of "having criminal and violent characteristics imputed to them in pursuing private litigation relating to their easement rights." Plaintiffs also alleged that Harrison's quote actually was not referring to nosey neighbors, but, instead, that the entertainer had said he felt "raped" by the press's attention to that lawsuit. Thus, in the libel complaint, plaintiffs also claimed they were defamed because *The Advertisers'* report falsely portrayed them as the target of Harrison's comment.

The newspaper, served with the lawsuit first (Harrison was not served until nearly a year later, in Great Britain), moved to dismiss. The trial judge, treating the motion as one for summary judgment — plaintiffs had not attached the publication to their complaint, so the newspaper attached it to its motion — rendered judgment for the newspaper on grounds the quote was clear "rhetorical hyperbole." *Gold v. Harrison,* slip op., Civ. No. 95-0554(2), 24 Med.L.Rptr. 1383 (Hawaii Cir. Ct. October 17, 1995).

Undaunted, plaintiffs — whose Kansas City, Mo.-based attorney had represented them in the easement — pursued the claim against Harrison. The entertainer not only moved to dismiss, but also requested sanctions against plaintiffs' lawyer, saying he should not have continued the claim against the entertainer in light of the trial court's earlier, resounding dismissal of the newspaper. The trial court agreed, faulting plaintiffs' counsel for prolonging the prosecution of the action against Harrison and awarding Harrison more than $12,000 in fees. *Gold v. Harrison,* slip op., Civ. No. 95-0554(2) (Hawaii Cir.Ct. November 14,1996).

(Continued on page 10)

HAWAII SUPREME COURT UPHOLDS DISMISSAL AND SANCTIONS

(Continued from page 9)

Adopting 9th Circuit Test on Protected Speech

The Hawaii Supreme Court, which took direct jurisdiction of plaintiffs' appeal rather than referring the matter to the Hawaii Intermediate Court of Appeals, this month unanimously affirmed the lower court in all respects. On the merits of the claim, Justice Nakayama's 27-page opinion for the Court adopted the Ninth Circuit's test "for determining whether a statement was false and defamatory":

> (1) whether the general tenor of the entire work negates the impression that the defendant was asserting an objective fact; (2) *whether the defendant used figurative or hyperbolic language that negates that impression*; and (3) whether the statement in question is susceptible of being proved true or false.

Gold and Whitney v. Harrison, et al., slip op., No. 20468 at 10-11 (Hawaii July 8, 1998) (emphasis in original) (citing *Fasi v. Gannett Co., Inc.*, 930 F.Supp. 1403, 1409 (D. Hawaii 1995), *aff'd*, 114 F.3d 1194 (9th Cir.), *cert. denied*, __ U.S. __, 118 S.Ct. 302 (1997)).

Next, surveying the U.S. Supreme Court precedent, the Court held that Harrison's statement "falls squarely within the *Bresler-Letter Carriers-Falwell* line of cases" since the statement plaintiffs complained of

> was an expression of [Harrison's] frustration over the circuit court's decision in the Easement Action, apparently prompted by his belief that the decision would compromise his privacy.

As for plaintiffs' assertion that the quote was false because Harrison allegedly meant he was being "raped" by the press's attention and not his opponents in the easement dispute, the Hawaii Supreme Court held the distinction made no difference to its analysis.

> Even the most casual reader would understand that "these people" — whether neighbors of Harrison's or persistent journalists — were not actually raping Harrison. Because Harrison's Statement could not actually have reasonably been interpreted as stating actual facts about the Plaintiffs, i.e., that they were rapists, Harrison's Statement was rhetorical hyperbole and protected by the first amendment.

Id., slip op. at 13.

The Court also rejected plaintiffs' comparison of their claim to *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496 (1991), in which the U.S. Supreme Court held an allegedly altered quote is actionable if it can be construed to convey a defamatory meaning. Unlike the allegedly false quote in *Masson*, the Hawaii Supreme Court held, in this case, "the substance of Harrison's Statement was not defamatory" since "it could not be construed as a statement that Harrison believed the Plaintiffs were, in fact, rapists, but was clearly rhetorical hyperbole." *Id.*, slip op. at 14-15.

Finally, the Court, without protracted discussion, concluded the trial judge also properly had dismissed plaintiffs' "derivative claims" of false light, emotional distress, negligence and slander charges, since Harrison's quote "was not defamatory." *Id.*, slip op. at 15.

Sanctions Against Plaintiffs' Lawyer

The Court also affirmed the award of attorneys' fees and costs against plaintiffs' lawyer, holding that the lawyer, in opposing Harrison's dismissal motion in the court below, "made no good faith argument for the extension or modification of the law" and had failed to argue why the trial court should not dismiss Harrison's claim in light of its dismissal the previous year of the case against *The Advertiser*. *Id.*, slip op. at 24. Finding that plaintiffs' counsel repeatedly ignored controlling authority brought to plaintiffs' attention, the Court also granted Harrison's request for attorneys' fees and costs on the appeal.

Charles D. Tobin, in-house counsel at Gannett Co., Inc. in Arlington, VA, assisted in the defense of The Advertiser, along with Jeffrey S. Portnoy and Peter W. Olson of Cades Schutte Fleming & Wright, Honolulu. Paul Alston, Susan Jameson and Marilyn Chung Ushijima of Alston Hunt Floyd & Ing, Honolulu, represented George Harrison.

Claim on America's Most Wanted Report and Reenactment Dismissed

By Donald L. Zachary

In the first Tennessee case to hold explicitly that a television broadcast based upon a script is to be considered a libel (not slander) for purposes of statute of limitations analysis, the Tennessee Court of Appeals at Knoxville affirmed summary judgment in favor of Fox Broadcasting Company granted by the Law Court for Washington County. *Ali v. Moore*, No. 03A01-9708-CV-00347 (Ct. App. June 16, 1998). Plaintiff/appellant Mohamed F. Ali sued defendant/appellee Fox Broadcasting Company for defamation as a result of two television broadcasts about charges against him of rape, his flight and his capture. The court also held that a criminal conviction is conclusive on the issue of truth. Ali's complaints about falsity, all of which Ali claimed were in a reenactment of his crimes and capture, were dismissed as "frivolous" when compared to the accurate sting of the broadcast.

Before December 1989, Ali was a physician in Johnson City, Tennessee. In July, 1989, Fredia Moore, a patient, visited him. After her appointment, Moore reported to the police that she had been sexually assaulted by Ali while she was under the influence of an injection. Later, Ali attempted to bribe Moore and her husband to have the rape charge dropped. Ali was indicted in December, 1989 on one count of rape and two counts of attempted bribery, was arrested and released after posting bond.

Flight and Capture: America's Most Wanted

Around June, 1990, Ali left the United States. On August 14, 1992, Fox broadcast an episode of the television program *America's Most Wanted.* The episode featured the rape and bribery charges brought against Ali and pointed out that his whereabouts were unknown. The episodes included interviews as well as a re-enactment of the alleged rape and bribery. A viewer of the episode contacted the authorities and reported that he had seen Ali in Cairo, Egypt. A subsequent investigation led to Ali's return to the United States in October 1992. Fox broadcast a follow-up program on Ali's capture in an *America's Most Wanted* episode aired on October 30, 1992. Ali also alleged that footage from the episodes were broadcast on the program *A Current Affair* on two occasions in the Fall of 1993.

In September, 1993 a jury convicted Ali of rape and one count of attempted bribery. On April 18, 1994, Ali filed an Amended Complaint naming Fox as a defendant. (He had previously sued Moore and others for defamation.)

Fox moved for summary judgment, arguing that Ali's claims were barred by the statute of limitations and that he had failed to establish the elements of defamation. The trial court granted summary judgment to Fox on August 22, 1996, without explaining its reasoning, and on February 4, 1997, made the order final (despite the remaining claims against the other defendants).

Statute of Limitations and Discovery Rule

The Appeals Court first addressed the issue of whether the trial court erred in granting summary judgment. With respect to the statute of limitations, the court pointed out that no reported case in Tennessee has addressed directly whether a television broadcast should be designated as libel or slander, and that there is no clear consensus among the states concerning the issue. *See* 50 Am. Jur. 2d *Libel & Slander* § 10 (1995). Slip op. at 5. The "most prevalent view," said the court, is that broadcast should be considered a libel, particularly if it is based on written scripts, citing *Jeffrey F. Ghent*, Annotation, *Defamation by Radio or Television*, 50 A.L.R.3d 1311, 1319 (1973), and the *Restatement (Second) of Torts* § 568A (1976). The court pointed out that construing the broadcast as libel was more favorable to Ali since libel carries a one year statute of limitations and the discovery rule applies, whereas the statute of limitations in Tennessee for slander is only six months and the discovery rule does not apply. *Id.*

The court then turned to Ali's argument that the discovery rule is applicable because he was overseas at the time the episodes of *America's Most Wanted* were aired on August 14, 1992 and October 30, 1992. Ali asserted he reasonably could not have discovered the Fox broadcast until he returned to the Untied States. While the court noted that the "decided modern trend in American jurisprudence"

(Continued on page 12)

TENNESSEE COURT OF APPEALS UPHOLDS SUMMARY JUDGMENT IN FAVOR OF FOX BROADCASTING

(Continued from page 11)

is in favor of applying the discovery rule in "limited situations where the allegedly libelous statement occurred in private or confidential publications which are not readily available to the plaintiff or the general public," Ali's case presented a different factual scenario. "At the time of the first broadcast, Ali was in Egypt, having left the country after he was released on bail. Assuming that the broadcast was not aired in Egypt, Ali's failure to discover the broadcast was due to his own behavior." Slip op. at 5-6. More importantly, said the court, "it is undisputed that at the time of the second broadcast, Ali was back in the United States, and the broadcast was neither 'secretative' nor of an 'inherently undiscoverable nature.' The second broadcast repeated a large part of the first broadcast and amply provided Ali of notice thereof." Since Ali's complaint against Fox was not filed until more than 16 months after the second broadcast, it was held to be barred by the one-year statute of limitations. *Id.* at 7.

Claims of Defamation "Frivolous"

Because the footage from *America's Most Wanted* was allegedly rebroadcast by *A Current Affair* within one year before the filing of Ali's complaint against Fox, the court next turned to the merits of Ali's claim and found that summary judgment was still appropriate.

Ali's pleading alleged six defamatory statements: (1) that he "raped" his patient; (2) that he bribed his patient and her husband; (3) that he said, "Call my wife! Tell her to get me out of here," as he was being lead to jail when, in fact, Ali had not been jailed at the time; (4) that the actor who portrayed Ali in the episodes was actually shown committing rape and bribery; (5) that the actor was wearing attire never worn by Ali; and (6) that Ali and/or his family lived in the "slums" of Cairo in 1992. Slip op. at 8.

The "sting" of the Fox broadcast, said the court, is that Ali was depicted as a rapist and as an attempted briber. "The other alleged defamatory allegations are frivolous. These other depictions do not subject Ali to 'public hatred, contempt or ridicule' and, thus, do not constitute a 'serious threat to [Ali's] reputation.'" *Id.*

On the issue of truth, the court found that a criminal court conviction by a jury is conclusive on the issue in a subsequent civil trial and, thus, works as an estoppel. Therefore, in a defamation action in which the truth is asserted as a defense, a court may take judicial notice of the plaintiff's conviction. In the instant case, because Ali was convicted of rape and attempted bribery, this must be accepted as the truth. *Id.* at 7-8. The Court characterized "Ali's contention that Fox' broadcasts were libelous because he had not been *convicted* at the time that the episodes were aired as "dubious." "The fact that Fox depicted Ali as a rapist and an attempted briber before a jury actually convicted Ali is irrelevant to the issue of whether the depictions were, in fact, true. The depictions made by Fox of Ali's actions were true at the time the episodes were aired." Slip Op. at 9.

The Court also rejected Ali's argument based on the fact that he was acquitted of one count of attempted bribery. As the Court noted, the "sting" of the alleged libel was that Ali attempted to bribe Moore and her husband. "We do not believe that Ali's reputation suffered further disgrace for being accused of twice committing attempted bribery in light of the fact that he was convicted of rape and one act of attempted bribery." *Id.*

In a footnote, the Court drove home the point concerning Ali's acquittal on one charge. "Although immaterial to our holding, we note that the fact that Ali was acquitted of one count of attempted bribery does not necessarily mean that Fox could not argue that Ali actually committed two acts of attempted bribery. The prosecution in Ali's criminal trial was faced with a higher burden of proving the truthfulness of the attempted bribery charges brought against Ali: guilt beyond a reasonable doubt. By contrast, in a civil suit Ali's culpability need only be shown by a preponderance of the evidence." *Id.* at n.7.

Finally, the Court upheld the trial court's decision making its order against Fox final, even though there were claims pending against other defendants, because there was "no just reason for delay." Slip op. at 9-10.

Donald L. Zachary is with the firm Bass, Berry & Sims PLC in Nashville, TN and represented Fox Broadcasting Company in this matter.

Texas Court Makes Strides in Libel-Proof and Substantial Truth Doctrines

By Laura Stapleton

The San Antonio Court of Appeals recently affirmed a summary judgment ruling in favor of the *Hondo Anvil Herald* newspaper, its reporter and its publisher in a libel case brought by Dr. Tommy Swate over an article that appeared in the paper chronicling his medical practice and its troubles. In doing so, the appellate court made significant strides in Texas law concerning both the libel-proof doctrine and the substantial truth doctrine. *Swate v. Schiffers* No. 04-97-00902-CV (Tex. Ct. App. Apr. 30, 1998).

Libel-Proof Plaintiff Doctrine

Under Texas law a defendant has long been able to plead facts concerning a plaintiff's reputation and the fact that the reputation was already bad in order to mitigate damages. Tex. Civ. Prac. & Rem. Code §73.003. For a plaintiff to be "libel-proof," however, typically requires evidence that the plaintiff engaged in criminal or anti-social behavior in the past and that those activities were widely reported to the public. *McBride v. New Braunfels Herald-Zeitung*, 894 S.W.2d 6 (Tex. App.--Austin 1994, writ denied).

At the time he sued the Hondo paper, Dr. Swate and his medical practice had been the target of extensive media attention for at least ten years; he had been the subject of three disciplinary orders from the Texas and Louisiana boards of medical examiners. Dr. Swate's privileges had been revoked by at least one hospital; he had been involved in several lawsuits involving his medical practice, and, he had been arrested for allegedly assaulting a female process server.

After reviewing the 24 newspaper articles, disciplinary orders, evidence of prior litigation and other various instances of professional misconduct, the court stated:

> Based on this evidence, the defendants argued that Swate was libel-proof; that is, Swate's reputation was so deplorable prior to the publication of Schiffers's article that the three statements could not have further injured Swate's reputation. We agree that Swate's reputation could not be further damaged by Schiffers's article.
>
> The court continued:
>
> While we need not include all of the details ... let it suffice to say that Swate has been the target of extensive negative media attention for at least ten years, so much so that it is impossible to believe Swate's reputation could have been further damaged by the statements in Schiffers' article.

Because the court holds that the publication was privileged as a reasonable and fair comment on matters of public concern and a fair, true and impartial account of a judicial or official proceeding, it ultimately need not determine if the defendants proved Dr. Swate was libel-proof as a matter of law.

In addition to the San Antonio Court of Appeals, other appellate courts in Texas have lent credence to the libel-proof plaintiff doctrine[1]; however, because the high court in Texas has yet to consider the libel-proof plaintiff doctrine, it is still unsettled as to whether Texas accepts the doctrine. Dr. Swate has petitioned the Texas Supreme Court to consider his case; if accepted, this may be the case in which the high court decides whether to accept the libel-proof doctrine in Texas.

Substantial Truth Doctrine

Although some could argue that the law concerning substantial truth in Texas is somewhat murky, the *Swate* case made the doctrine clearer and broader than we had previously seen. Under the substantial truth doctrine, one must look at the facts underlying the "gist" of the statement and if they are true or undisputed, any variance with respect to items of secondary importance can be disregarded. Thus, minor inaccuracies are permissible so long as the "gist" of the story is not changed. The question then becomes how far does one look for the

(Continued on page 14)

Texas Court Makes Strides in Libel-Proof and Substantial Truth Doctrines

(Continued from page 13)

underlying facts and what circumstances does one consider in determining the "gist" of the story.

Rogers or Norris' Approach

In *Rogers v. The Dallas Morning News, Inc., et. al.*, 889 S.W.2d 467 (Tex. App. -- Dallas 1994, writ denied), the Court looked at the articles at issue in their entirety to determine whether, in the mind of the average reader, the alleged defamatory statements were more damaging to the plaintiff's reputation than truthful statements would have been. Although the plaintiff in *Rogers* disagreed with the accuracy of isolated passages, that did not suffice because she did not challenge the underlying facts constituting the gist of the defamatory charges and those facts were conclusively established by the summary judgment record.

In *Delta Air Lines, Inc. v. Norris*, 949 S.W.2d 422 (Tex. App. -- Waco 1997, writ denied), however, the Court took a narrower approach. Although the Waco court cited to *Rogers*, it stated that under the substantial truth test one was to examine "each statement in question, in entirety" in deciding whether the summary judgment record conclusively shows that the "gist" of the statement is substantially true. This approach of isolating individual statements is contrary to established law in Texas, which has long been that one must consider allegedly defamatory statements in context, not in isolation. *Musser v. Smith Protective Services, Inc.*, 723 S.W.2d 653, 655 (Tex. 1987); *Schauer v. Memorial Care Systems*, 856 S.W.2d 437, 446 (Tex. App.--Houston [1st Dist.] 1993, no writ).

Not surprisingly, the narrow interpretation by the court in *Norris* is being seized upon by the plaintiffs' bar to argue that one should only look at the individual statements at issue. The distinction, although seemingly subtle, is a critical one for media defendants.

The San Antonio court in *Swate v. Schiffers* endorsed a broad outlook for considering the entire publication and the circumstances surrounding it, rather than merely the individual sentences at issue, in applying the substantial truth doctrine and in determining whether an article is substantially true. In this case, the Court of Appeals painted broad strokes by stating:

> In the instant case, the gist of the article was that Swate had failed to practice medicine in an acceptable manner, that he was on probationary status as a doctor, that Medina Community Hospital (MCH) had terminated his employment, and that Swate was suing MCH. The defendants proved the truth of these facts. The agreed orders entered by the Texas Board of Medical Examiners established numerous acts of professional incompetence which injured patients. As a result, the article is substantially true. Even if the eight individual statements were false, they constituted a variance which would not overcome the substantial truth of the article. In light of the substantial truth of the article, the effect of the individual sentences would have been no more damaging to Swate's reputation in the mind of the average reader than truthful statements would have been.

It is clear that the court did not follow the *Norris* court's lead and consider the sentences in isolation; instead, by considering all of the circumstances surrounding the article and the contents of the article at issue, the court determined that the "gist" of the article was substantially true.

Other Significant Points Made By The San Antonio Court of Appeals

In addition to the strides made with the libel-proof and substantial truth doctrines, the court also provided beneficial language for media defendants about the limited purpose public figure doctrine. Even though Dr. Swate advocated that he had not voluntarily thrust himself into the controversy concerning his medical practice, the court ruled that he had, in fact, been drawn into the controversy so much so that it was proper to characterize him as a limited purpose public figure. Further, the court found that it was sufficient for the reporter and the paper to rely on other newspaper articles written about Dr. Swate to disprove malice and to show that they were motivated by a desire to inform the public about the quality of medical care provided by Swate and to update the public on the latest developments

(Continued on page 15)

Texas Court Makes Strides in Libel-Proof and Substantial Truth Doctrines

(Continued from page 14)

in the continuing controversy about his practice. Finally, the Court determined that the statements at issue in the case were privileged because the discussion addressed medical care for members of the public and, as such, the article addressed a matter of public concern.

Ms. Stapleton is a partner at Jackson Walker, L.L.P. in their Austin office. Frank Vecella and James M. McCown of Jackson Walker represented the Hondo Anvil Herald in the case discussed throughout this article.

Endnote:

1 In *Finklea v. The Jacksonville Daily Progress*, 742 S.W.2d 512 (Tex. App.--Tyler 1987, writ dism'd w.o.j.), the court of appeals affirmed a summary judgment by applying the libel-proof plaintiff doctrine. In both *Langston v. Eagle Printing Co.*, 719 S.W.2d 612 (Tex. App.--Waco 1986, writ ref'd n.r.e.) and *McBride v. New Braunfels Herald-Zeitung*, *supra*, the courts acknowledged the validity of the doctrine but held that it was inapplicable to the facts of the case.

Update: *Van Horne v. Muller* On Appeal to Illinois Supreme Court

Claims of Negligent and Reckless Employment of On-Air Talent

The Supreme Court of Illinois has agreed to hear an appeal from a decision of the First District, Appellate Court of Illinois, reversing a dismissal by the trial court of claims of negligent and reckless hiring, retention and supervision against a Chicago radio station based upon the allegedly defamatory speech of one of its controversial on-air talent. Plaintiff, a public figure and former on-air personality for the station, charged that an encounter with defendant, Mancow Muller, resulted in Muller's defaming plaintiff on the air with the aid of his newscaster sidekick. In addition to charging Mancow, the newscaster and the station with defamation, the plaintiff charged the station with the hiring, retention and supervision claims because of Mancow's reputation, not for defamatory speech, but for numerous controversial on-air stunts. Mancow's antics included blocking the San Francisco Bay Bridge while working in that market.

Defendants (represented by D'Ancona & Pflaum, Chicago) are joined in their appellate briefing by a group of *amicus* (represented by Jenner & Block, Chicago, and Levine, Pierson, Sullivan & Koch, L.L.P., D.C.) that includes major radio group owners and trade associations.

Amicus argue that regardless of the label affixed to the claim, where the damages that a public figure plaintiff asserts are from allegedly defamatory speech, the claims are subject to the same First Amendment requirements as libel. They also argue that even were plaintiff's claims allowed to stand, because of his failure to allege that the on-air defendants had engaged previously in a pattern (or even any) allegedly defamatory conduct, plaintiff failed to prove a nexus between the allegedly wrongful conduct and his injury. Lastly, they argue that the appellate court's allowance of these employment claims violates First Amendment principles by allowing juries to determine whether the controversial conduct of the speaker renders him "fit" or unfit to be allowed to speak.

Chiquita Sues Former Cincinnati Enquirer Investigative Reporter in Twelve Count Complaint

Alleging defamation, violation of federal and state wiretapping statutes, trespass, conversion, civil conspiracy, fraud, and inducement to breach employee contracts and fiduciary duties, Chiquita Brands International, Inc. filed suit in the United States District Court for the Southern District of Ohio against former *Cincinnati Enquirer* investigative reporter Michael Gallagher on June 2, 1998 over his series of articles entitled "Chiquita Secrets Revealed" published in May. The articles, the first of which ran on May 3, 1998, chronicled alleged abuses by Chiquita in their international business practices that spawned shareholder lawsuits and a SEC investigation. Research for the articles included intra-company messages taken without authorization from Chiquita's official voicemail system.

An Apology

The *Cincinnati Enquirer*, owned by Gannett Co., entered into a well-publicized settlement agreement that included a payment to Chiquita of no less than $10 million and a formal apology distancing the newspaper from Gallagher and accusing him of "deception and unlawful conduct." See page for 17 a reprint of the *Enquirer* apology.

When the story ran, Gallagher claimed that a high-level source within Chiquita provided him with tape recordings of more than 2,000 internal voicemail messages. Chiquita executives regularly used voicemail as a system to create and distribute detailed internal memoranda. Gallagher maintained that he looked at both public and internal documents concerning Chiquita; traveled to Latin America, the Caribbean Islands, and Europe; and interviewed various sources, including farm laborers, managers, environmentalists, government officials, financial experts, lawyers, professors, and Chiquita executives during the course of his one-year investigation.

Despite the *Cincinnati Enquirer's* original official statement supporting Gallagher's newsgathering methods, ensuring that the "stories were highly detailed and fully documented," after further investigation, the *Enquirer* switched direction and fired Gallagher. Its public apology to Chiquita, which headlined the paper's front page and appeared on its web site for three days following the settlement on June 28, concluded that "not only was there never a person at Chiquita with authority to provide privileged, confidential and proprietary information, but the facts now indicate that an *Enquirer* employee was involved in the theft of this information in violation of the law." In such enigmatic fashion, the *Enquirer* cast doubt on the accuracy of its articles without offering any specifics.

Eavesdropping Claims Alleged

Chiquita alleges in its complaint that Gallagher's interference with the password-protected voicemail system, which is controlled by a computer, is tantamount to theft under the federal Electronic Communications Privacy Act and the Ohio Wiretapping Act, which prohibit the interception of private, electronic communications without a court order or permission from the involved parties. Additionally, the complaint claims that Gallagher violated Ohio's eavesdropping statute by intentionally gaining unauthorized access to Chiquita's computer-controlled voicemail system.

Gallagher refuses to comment on how he received the messages, but the complaint attributes Chiquita employees, named as Does 1-3, with providing Gallgher with the know-how to enter the system. According to the complaint, Chiquita was able to review the electronic records of its voicemail system to determine when Gallagher "and his co-conspirators" accessed it. These unauthorized invasions included access to the voicemails of Chiquita's General Counsel and several of its attorneys, among others.

The complaint alleges that Gallagher would pose questions to Chiquita representatives and then eavesdrop through the voicemails as Chiquita employees discussed their proposed responses to his inquiries. Chiquita asserts that Gallagher would then revise or drop old questions and pose new ones based upon what he learned from the voicemails. The complaint specifies more than fifty unauthorized entries to the voicemail system in the ten-day period prior to the story's appearance in the Enquirer. In addition to conversations about business matters, Gallagher is accused of listening in on personal matters on voicemails.

Chiquita argues that statutory violations occurred

(Continued on page 17)

Chiquita Sues Former Cincinnati Enquirer Investigative Reporter in Twelve Count Complaint

(Continued from page 16)

whether Gallagher actually broke into the system himself or if he induced, encouraged, aided and abetted Chiquita employees to help him obtain the messages.

Gallagher Charged with Providing Confidential Info to Chiquita Foes

Chiquita also charges that Gallagher gave stolen materials -- specifically, privileged communications of Chiquita and its attorneys about on-going litigations in which Chiquita was a party -- to parties who are litigating against Chiquita and their attorneys. He is accused of distributing voicemail messages to a registered foreign agent and lobbyist working against Chiquita in its efforts to open up the European markets to bananas from the Latin American countries that serve as Chiquita sources. The messages allegedly given to the lobbyist were those of Chiquita personnel discussing their strategy on this matter.

Chiquita contends that Gallagher exhibited malice by, among other things, agreeing with his co-author, who is not a defendant in the suit, that the co-author was to hand out copies of the articles at the International Banana Conference held in Brussels in May 1998 and encourage negative follow-up press.

Chiquita's defamation claim alleges actual malice based, in part, upon Gallagher's failure to adhere to the standard newsgathering procedures followed by the Cincinnati Enquirer, particularly his alleged bypass of five different levels of editing.

Conversion, Trespass and Conspiracy

The basis for the conversion claim is that the illegal interception, theft and disclosure of Chiquita documents and voicemails for purposes adverse to Chiquita's interests constitutes wrongful conversion of property, interfering with Chiquita's exclusive ownership and legitimate business use of its voicemail system and documents.

The trespass claim relies upon Gallagher's tampering with the proprietary voicemail system and the confidential information stored in it to deprive Chiquita of the system's proper use, its quality and value to Chiquita, and to disable it (to a certain extent, literally, by preventing access from within Chiquita and deactivating message signal lights) as an effective business communications tool.

Chiquita bases its civil conspiracy claim on Gallagher's collaboration with third parties to illegally obtain confidential information and their subsequent refusal to turn over the voicemail contents.

The fraud claim asserts that by using unsuspecting parties' voicemail passwords each time he entered a voicemail box without legitimate authorization, Gallagher mistrepresented himself as an authorized user of the system.

Inducement to Breach Confidentiality Agreements and Duty

In addition, the complaint charges Gallagher with inducing Chiquita employees, Does 1-3, to disclose proprietary information to an unprivileged party, and to breach their employment contracts (which, according to the complaint, all employees are required to sign and which bind them to maintain the confidentiality of Chiquita information, documents and communications), along with their fiduciary duties to the company.

Chiquita makes claim as well under an Ohio statute, Ohio Rev.Stat.Section 1333.81, which imposes a duty on employees to maintain the confidences of their employer.

In addition to seeking both compensatory and punitive damages, Chiquita seeks an order requiring Gallagher to return any ill-gotten materials (including copies), refrain from disclosing any information based upon the voicemail contents, and identify any other parties to whom he has revealed information.

Criminal Investigations Underway

Both the FBI and specially-appointed Ohio prosecutor Perry Ancona are conducting a coordinated investigation of Gallagher's potential criminal wrongdoing. Gallagher recently was called to testify before a grand jury, but asked the judge to throw out the subpoena. The reason for his request is not public, and records from the case have been sealed at the request of the special prosecutor.

(Continued on page 18)

Chiquita Sues Former Cincinnati Enquirer Investigative Reporter in Twelve Count Complaint

(Continued from page 17)

News Interest in the Story Continues...

Despite the focus on Gallagher's newsgathering techniques and the *Enquirer's* official statement that the "representations, accusations and conclusions are untrue and created a false and misleading impression of Chiquita's business practices," no specific details indicate which facts in the original articles are false.

A *Wall Street Journal* article published on July 17 reported more detailed information about the voicemail break-ins, including that calls to the system were traced to pay phones near Gallagher's home and office. In the article, anonymous *Cincinnati Enquirer* insiders claimed that editor Lawrence Beaupre reprimanded Gallagher for entering the system to verify already-received information before the story was published. Other sources told the *Wall Street Journal* that Chiquita's outside counsel, Kirkland & Ellis, suspected a leak of confidential information and had engaged in ongoing correspondence with the *Enquirer's* attorneys, who repeatedly informed them that the reporter's newsgathering stayed within legal and ethical bounds.

On July 17, the *New York Times* also published an article quoting insiders who stated that the stories were thoroughly edited both by senior editors and outside legal counsel, although the normal editorial review was abandoned due to fear of leaks. Furthermore, it contained an admission from Chiquita executives that the voicemails and internal documents were authentic. A lawyer for the SEC divulged that it will continue to pursue its investigation into the business practices reported in the newspaper articles, including that Chiquita secretly controls other seemingly independent banana companies.

Gallagher still hasn't spoken publicly on the issue. Apart from asserting a series of detailed defamation claims against Gallagher concerning the charges, Chiquita, according to news reports, refuses to respond to further inquiries about the article's allegations, especially whether it uses pesticides dangerous to its workers, has engaged in or covered up Columbian bribes, allows its ships to smuggle cocaine into Europe, or employs plantation security guards who use unnecessary violence on workers, indicating that it may interfere with the various investigations generated by the original stories.

The following was the apology published by the Cincinnati Enquirer:

An Apology to Chiquita

Starting on May 3,1998, the Enquirer published a series of articles regarding Chiquita Brands International. Many of the conclusions in these articles were based upon the contents of voicemail messages of employees of Chiquita. At the time, the Enquirer believed that the series' accusations against Chiquita were based upon what was thought to be factual information obtained in an ethical and lawful manner. Specifically, the Enquirer asserted that the voicemails were provided by "a high ranking Chiquita executive with authority over the Chiquita voicemail system."

The Enquirer has now become convinced that the above representations, accusations and conclusions are untrue and created a false and misleading impression of Chiquita's business practices. We have withdrawn the articles from continued display on the Enquirer's Internet web site and renounce the series of articles.

Information provided to the Enquirer makes it clear that not only was there never a person at Chiquita with authority to provide privileged, confidential and proprietary information, but the facts now indicate that an Enquirer employee was involved in the theft if this information in violation of the law.

The employee involved, lead reporter Mike Gallagher, has retained counsel and will not comment on his news gathering techniques. Despite his assurances to his editors prior to publication that he obtained his information in an ethical and lawful manner, we can no longer trust his word and have taken disciplinary action against him for violations of Enquirer standards. The Enquirer will continue to investigate whether others involved in the Chiquita articles also engaged in similar conduct.

We want to send a strong message that deception and unlawful conduct has no place in legitimate news reporting at the Enquirer.

We apologize to Chiquita and its employees for this unethical and unlawful conduct and for the untrue conclusions in the Chiquita series of articles.

-- The Cincinnati Enquirer

Harry W. Whipple, publisher

Lawrence K. Beaupre, editor

N.Y. Appellate Court Reinstates Emotional Distress Claim Over Handling of Cremated Remains

By Jeremy Feigelson

A divided panel of an intermediate appellate court in New York has reinstated a claim that Howard Stern and his corporate parent Infinity Broadcasting (now CBS) committed the tort of intentional infliction of emotional distress when they staged an unorthodox farewell to a deceased fan and guest named Debbie Tay.

Ms. Tay -- known during her lifetime as the "Space Lesbian" because she claimed to have relations with female space aliens -- died and was cremated. Her sister chose to give away a portion of the cremated bone fragments to a good friend of Ms. Tay's named Chaunce Hayden, who informed Mr. Stern that he had the remains. Ms. Tay's brother, who according to the record had been "estranged" from her and had no involvement in the disposition of her body, allegedly called the show to ask that no further discussion of the remains take place.

Her Last Appearance

Thereafter, Mr. Hayden brought a box containing some of the fragments to the Stern studio. Stern and his cast spent 45 minutes or so paying an irreverent on-air tribute to Ms. Tay. They discussed, among other things, her battles with drug addiction, her sexuality, her untimely death, the peculiar disposition of her remains, and her love of the Stern program, on which she had frequently appeared. In fact, bringing her cremated remains onto the show was referred to as "her last appearance."

In the video version of this tribute, broadcast as part of Stern's regular show on E! Entertainment Television, clips of Ms. Tay's prior appearances on the Stern show were added, including footage of her appearance as "Miss Space Lesbian" in a mock beauty pageant. In the context of joking about the sister's decision to divide up Debbie Tay's remains, and Hayden's habit of keeping the remains on top of his dresser and singing to them, Stern et al. briefly passed around and handled some of the bone fragments. The show concluded with Stern admonishing Hayden to dispose of the remains properly. The television version ended with the superimposed words, "dedicated in loving memory of Debbie Tay."

Trial Court: Vulgar But Not Outrageous

Ms. Tay's brother and sister sued in New York Supreme Court for Kings County. While their complaint was not extremely specific, they appeared to be invoking the torts of intentional and negligent infliction of emotional distress. In response to a motion to dismiss, the plaintiffs shifted ground to assert instead that defendants had committed the tort of mishandling the remains of the dead.

Notwithstanding this change in theory, the trial court granted Stern's and Infinity's motion that the complaint failed to state a claim as a matter of law. Use of the "mishandling" tort, the court noted, is limited to circumstances where the next of kin have been denied their right to receive and dispose of a loved one's remains. Thus, the tort does not apply in a case like this one where the family received the body, chose to have it cremated, and voluntarily gave some of the cremated remains to a friend. The requirements of the "intentional infliction" tort, the court went on to hold, never have been found satisfied by the New York Court of Appeals and were not satisfied here. In particular, the broadcast, while "vulgar and disrespectful" in the court's view, was not sufficiently "outrageous" to be actionable.

An Appeals Panel Disagrees

Plaintiffs appealed. Briefing and argument on appeal focused largely on the "mishandling" tort, and the Appellate Division agreed that no claim for mishandling was stated. But three of the four panel members disagreed with the trial court on the issue of intentional infliction of emotional distress, and ordered that the case be reinstated on that theory. The majority held that "a jury might reasonably conclude that the manner in which Tay's remains were handled, for entertainment purposes and against the express wishes of her family, went beyond the bounds of decent behavior."

In a forceful dissent, Justice Krausman pointed out that the "outrageousness" element "cannot be considered in a vac-

(Continued on page 20)

N.Y. Appellate Court Reinstates Emotional Distress Claim Over Handling of Cremated Remains

(Continued from page 19)

uum, with total disregard for who Debbie Tay was." Given Ms. Tay's unusual life, the fact that she "rose to fame by spinning outrageous tales of sexual encounters with female aliens on the Howard Stern show," and the fact that defendants clearly were trying to pay a humorous tribute, the dissent would have sustained the trial court's dismissal of the complaint, under the principle set forth by the New York Court of Appeals that the pleading requirements of the emotional distress tort are "'rigorous and difficult to satisfy.'" As Justice Krausman wrote: "[T]here is no indication that Stern or Infinity acted out of a desire to cause the plaintiffs distress. Indeed, at the end of the show, Stern advised Hayden that he should have the decedent's remains properly buried or turned into ashes, telling him to 'remember her in your mind.'"

Both the dissent and the majority focused almost exclusively on the element of outrageousness, as common in the case law on this tort. Neither opinion discussed a series of other objective requirements of the intentional infliction tort, such as the requirement that the challenged conduct be unconnected to any proper business purpose, the requirement that the conduct amount to a "campaign" of harassment rather than a single act, and the requirement that plaintiffs allege an extraordinary, disabling degree of distress rather than mere emotional upset. Although defendants cited numerous authorities showing that these other requirements compelled dismissal of plaintiffs' complaint, even if the broadcast were assumed to be sufficiently "outrageous," the court did not address these points.

The defendants plan to move for leave to appeal to the New York Court of Appeals.

(*Roach v. Stern*, ___ A.D.2d ___, ___ N.Y.S.2d ___ (App. Div. 2d Dep't Jul. 6, 1998).

Jeremy Feigelson is a senior associate with Debevoise & Plimpton. With Bruce P. Keller and Peter Johnson of Debevoise & Plimpton, he represents Stern and CBS in this case.

Cover Date versus Publication Date: Another Plaintiff Misses the Statute of Limitations

The plaintiff, Printron, Inc., felt that it had been defamed by an article in the September 12, 1994 issue of Business Week. It filed its complaint on September 11, 1997 in the Federal District Court for the District of New Mexico. Did it have it to the day under New Mexico's generous three-year statute of limitations? No.

New Mexico is a state that applies the single publication rule. The statute of limitations runs from the date of publication. There is nothing unusual in any of this.

That issue of *Business Week* was shipped from the printing plant to its wholesalers and to post offices on September 1, 1994. On September 2, 1994, wholesalers began deliveries and by September 5, the magazine was on display for sale to the public. Most subscribers had it in their hands by September 6th. In fact, according to the opinion of the court, the offending issue of *Business Week* was off the newsstands by September 9 having been replaced by the September 19 issue.

Other claims in Plaintiff's complaint -- injurious falsehood, interference with contractual relations, and others -- were found to be governed by the same limitations period as the defamation claim under New Mexico law. Defendant's Motion for Summary Judgment was granted. Plaintiff's complaint was dismissed. *Printron, Inc. V. McGraw-Hill, Inc.*, No. Civ 97-1218-MV/JHG (D.N.Mex. 6/23/98)

William S. Dixon of Rodey, Dickason, Sloan, Akin & Robb,P.A. represented McGraw-Hill, Inc. in this matter.

INVESTIGATING CHILD PORNOGRAPHY ON THE INTERNET

The Chilling Warning of *U.S. v. Matthews*

By Stuart F. Pierson

By orders issued June 29, and July 2, 1998, United States District Judge Alexander Williams, Jr., of the District of Maryland, denied a motion to dismiss and granted the government's motion *in limine*, holding that a news reporter cannot raise the First Amendment as a defense to criminal charges that he was engaged in trafficking child pornography on the Internet. In *U.S. v. Matthews*, the court so held despite defendant's contentions that he was gathering information for an article on cyber-porn and law enforcement efforts to combat the problem for an article, and that he had reported his investigation and findings to the FBI.

An Initial News Series

In 1995, Larry Matthews, an award-winning career news reporter for over a quarter century, undertook an investigation of child pornography on the Internet. Among other techniques, he clicked into chat rooms where participants promoted sexually explicit, graphic material of children. He received such material on request, and transmitted some of what he received in order to get other material in return. He never created or originated any pornographic material.

During his investigation, he talked frequently with the FBI and local law enforcement, telling them what he had found and inquiring about their efforts to combat child pornography in cyberspace. Through his conversations with the FBI, he learned that both federal and state authorities were themselves transmitting and receiving child pornography. Later in the year, a local station broadcast a three-part series he prepared on child cyber-porn and what law enforcement was doing about it. Matthews was never prosecuted for that series or his investigation for it.

Mathews In Touch With FBI

In mid-1996 Matthews, freelancing at the time, returned to further investigation of cyber-porn for use in a prospective magazine article, renewing his investigation on the Internet and his conversations with law enforcement. As before, he never created or originated any of the offensive material; he only received and exchanged material already offered. In September 1996, Matthews spoke with the head of the FBI pornography task force in person, reminding him that there was one purveyor of child pornography whose material was particularly explicit and offensive and which included offers for prostitution of minors – "CP", for ease of reference. The FBI said it was aware of the person and was investigating the matter, but it concealed from him the fact that CP was actually an FBI agent.

In December 1996, without any prior indication he was a suspect – indeed, despite his continuous contact and discussion with the FBI – federal authorities served a search warrant on Matthews' home, seizing all of his and his family's computer equipment. In the affidavit supporting the application for the warrant, the FBI acknowledged that Matthews had told them he was working on another report about child pornography on the Internet. Nonetheless, in July 1997, Matthews was indicted on 15 counts of violating the Protection of Children Against Sexual Exploitation Act, 18 U.S.C. § 2252. Most of the counts were based on communications with CP.

Intent Irrelevant

In response to Matthews' motion to dismiss, Judge Williams rejected the arguments of Matthews and amici that application of the statute would be unconstitutional in his case. Relying on Supreme Court decisions, particularly *U.S. v. X-Citement Video, Inc.*, 513 U.S. 64 (1994) and *New York v. Ferber*, 458 U.S. 747 (1982), Judge Williams held that § 2252 may be applied to any person who either receives or transmits child pornography in interstate commerce, even where the purpose of the activity is solely to discover and publicly report what is available and what law enforcement is doing about it. He reasoned that this construction of the statute serves its evident purpose indirectly to reduce the initial abuse of children by criminalizing the demand for pictures created by the abuse.

In explaining his decision, Judge Williams noted com-

(Continued on page 22)

INVESTIGATING CHILD PORNOGRAPHY ON THE INTERNET

(Continued from page 21)

ments of several justices in *Ferber* suggesting that some uses of child pornography – e.g., for serious literary, artistic, scientific or medical value – would warrant First Amendment protection, because the nature of their origination and the motive behind the use are a valuable contribution to society. He was not persuaded, however, that, in balancing the interests served by the statute against the needs of news reporting on cyber-pornography, news gathering should be entitled to the same protection, reasoning that news gathering is too close to the insidious demand the statute was intended to punish.

Court: Other Means to Report Story

In explaining his conclusion, Judge Williams added that there were other lawful methods Matthews could have used to gather the information he needed, such as developing sources among convicted pornographers and public interest groups, as well as direct inquiry to law enforcement and observation of prosecutions. Anticipating the obvious rejoinder that law enforcement cannot be relied upon to tell on itself, he observed that he still could not see how Matthews' trafficking in pornography could expose government wrongdoing.

Judge Williams' explanation ignores, of course, the fact that, without examining what is available on the Internet, a news reporter does not know where to start in identifying the source of cyber-porn. Equally important, considering the facts of Matthews' case, it would be virtually impossible without the methods he used for the public to learn that its law enforcement agencies are blindly sending explicit sexual depictions of children to anyone who has access to the Internet.

Indeed, the irony of the court's decision is that Matthews merely received and exchanged CP's pornography; whereas it was the FBI that was originating the material the statute is intended to prevent, aggravating its conduct by offering one of the subjects for prostitution.

After the court's ruling, Matthews entered a conditional plea of guilty to allow him to take the constitutional issue to the Fourth Circuit.

Stuart F. Pierson is with the firm Levine Pierson Sullivan & Koch L.L.P in Washington, DC.

STATE REGULATION OF THE INTERNET AND THE COMMERCE CLAUSE

By Michael A. Bamberger

The Internet is, by its nature, an interstate--in fact, international--medium. The sender of a communication on the web, to a chat room, onto a bulletin board, or via e-mail does not know where the communication will be received. Nor can the sender prevent the communication from being accessed in any given state. Thus, the Commerce Clause is highly relevant to state regulation of the Internet.

There have been remarkably few decisions which have discussed and decided the issue. The leading case is *American Library Ass'n v. Pataki*, 969 F.Supp. 160 (S.D.N.Y. 1997), featuring a lengthy discussion of the issue by Judge Loretta A. Preska. The case involved a successful challenge of a New York statute prohibiting the initiation of or engaging in an indecent communication with a minor over the Internet. The suit was brought by a group of individuals and organizations who use the Internet to communicate, disseminate, display and access a broad range of communications from within and outside New York.

The Court found that the statute could not be limited to apply to intrastate communications because of the nature of the Internet:

> The Internet is wholly insensitive to geographic distinctions. In almost every case, users of the Internet neither know nor care about the physical location of the Internet resources they access. Internet protocols were designed to ignore rather than document geographic location; while computers on the network do have 'addresses,' they are logical addresses on the network rather than geographic addresses in real space. The majority of Internet addresses contain no geographic clues and, even where an Internet address provides such a clue, it may be misleading. . . . Moreover, no aspect of the Internet can feasibly be closed off to users from another state. . . . Even in the context of e-mail . . . a message from one New Yorker to another New Yorker may well pass through a number of states en route.

ALA v. Pataki, at 170-171.

Based on these findings, the Court held that the statute violated the Commerce Clause in three respects: 1) it represented an unconstitutional projection of New York law into conduct that occurs wholly outside New York; 2) although protecting children from indecent materials is a legitimate subject of state legislation, the resulting burdens on interstate commerce exceed the local benefit; and 3) the Internet is one of those areas of commerce which, like the railroads, must be marked off as a national preserve to protect users from inconsistent legislation that could paralyze development of the Internet.

Although the opinion appears to be only a decision on a preliminary injunction, the parties subsequently agreed to convert the injunction to a permanent injunction and declaration of unconstitutionality.

In June of this year, a similar issue as to the Commerce Clause was litigated in the federal District Court in New Mexico. The same result was reached, although the Court issued only Findings of Fact and Conclusions of Law. *ACLU v. Johnson*, CIV 98-9474 LH/DJS (D.N.M., June 30, 1998).

While *ALA v. Pataki* should provide a strong basis for limiting state regulation of Internet content, it should be noted that two subsequent New York State trial court cases have distinguished its holding. *People by Vacco v. Lipsitz*, 663 N.Y.S.2d 468 (Sup. Ct. N.Y. Co. 1997), was a suit by the New York Attorney General for consumer fraud and false advertising targeting the world-wide Internet audience. The defendant was a business physically located in New York. The Court granted relief, stating that this case involved "consumer protection laws applicable to the conduct of a local busi-

(Continued on page 24)

STATE REGULATION OF THE INTERNET AND THE COMMERCE CLAUSE

(Continued from page 23)

ness, which were not designed or aimed at regulating conduct outside this State's borders." (*Lipsitz*, at 475). Further, the Court found that local consumer fraud laws touch on no known federal law that requires uniformity; nor are they an attempt to regulate speech on the Internet or create an Internet regulatory scheme. Id.

The second case, *People v. Barrow*, 664 N.Y.S.2d 410 (Sup. Ct. Kings Co. 1997), was a criminal prosecution for transmitting child pornography and attempted "cyber child molesting." The investigator pretended to be a minor was in Brooklyn. The defendant apparently lived in Connecticut but came to Brooklyn to meet his "child" Internet correspondent. The Court found that the statute was not unconstitutional since it included the element of "luring a minor to engage in sexual conduct," a portion of the statute specifically not challenged in *Pataki*. Thus, "an Internet user need have no fear about the nature or content of transmissions, under the statute, so long as it is not coupled with an attempt to lure a minor into sexual conduct." (*Barrow*, at 413).

Neither of these cases diminish the basic holding and significance of *ALA v. Pataki*.

Michael A. Bamberger is a partner with the law firm of Sonnenschein Nath & Rosenthal, located in its New York office. Mr. Bamberger was co-counsel for plaintiffs in both American Library Ass'n v. Pataki and ACLU v. Johnson.

E-Mail Your Cyber-Address to the LDRC Website

We would like to be able to reach you by e-mail. It is often a fast, efficient means to communicate on LDRC projects, committee matters, etc. Please let us know your e-mail address.

LDRC has had a home on the Web at www.ldrc.com since November 1997. We have found it useful for posting press releases, promotional material, and also receiving inquiries from individuals and organizations interested in learning more about LDRC. You may leave messages for LDRC there or find information about LDRC activities and publications.

The web site also contains a page with links to our membership, both media and Defense Counsel Section. In this way, we hope to strengthen the national and increasingly, international, network of attorneys and media representatives that LDRC has become. If you wish to have your firm/organizations's site linked from LDRC's Links page please submit your firm/organization's web address along with the e-mail address of a contact name to ldrc@ldrc.com.

Canadian Court Orders Internet Identities Revealed

A Canadian company that was the subject of anonymous, critical messages in an Internet newsgroup obtained an order from a Toronto court directing 12 Internet service providers to reveal the true identities of 26 message posters. According to an article in the *Wall Street Journal*, Philip Services, a billion dollar Canadian industrial services company, took legal action to stop what a spokesman called "a torrent of abuse" directed at employees, including what it described as threats of "stalking," "ethnic slurs," and "sexual harassment" in messages posted in a Yahoo financial forum. The spokesman denied that the action was aimed at silencing critics of the company's recent financial losses and decline in stock price. *Wall Street Journal*, 7/13/98, B6.

According to the article, the affected Internet service providers weren't made aware of the court proceeding prior to the issuance of the order. Nevertheless, many have already complied. A spokesman for Yahoo is quoted as saying, "We do comply with all valid court ordered subpoenas and did so in this case." Philip Services said it also obtained a court order from a Superior Court in Santa Clara County, California to learn the identity of a message poster. Although Philips Services has obtained the identities of many of the anonymous posters it has not yet taken any legal actions against them.

It May Not Be Anonymous But Is It Defamatory?

Among other things, the case hightlights the fact that most Internet communications are not truly anonymous. While many ISP's have policies protecting subscribers' privacy, their identities are frequently made available to law enforcement officials or in response to subpoenas. For example, as reported several years ago in the *LibelLetter*, AOL will comply with subpoenas and other valid process seeking a subscriber's identity, although it is AOL's policy to notify a subscriber before any disclosure is made so that the subscriber can seek to quash or otherwise deal directly with the plaintiff. *See LibelLetter* 11/95 at 8. This policy is still in effect.

With regard to defamation law, one question posed is whether in the young and developing medium of the Internet potentially defamatory statements posted in newsgroups either anonymously or under an actual name should even be considered statements of fact or whether such statements should be considered, and are understood as, vituperative and hyperbolic rantings akin to exchanges on talk radio.

Supreme Court Justices Say They'll Consider European Court Decisions

On a visit to the European Commission, a group of Supreme Court Justices expressed their willingness to have European Court of Justice decisions cited to the US high court. Justices Sandra Day O'Connor, Ruth Bader Ginsburg and Stephen Breyer were on a 10 day mission visiting various European Union institutions as part of a 1995 summit agreement on US-EU cooperation.

A July 8, 1998 Reuters news report quotes Justice Breyer as stating at a press briefing that "Lawyers in America may cite an EU ruling to our court to further a point and this increases the cross-fertilization of US/EU legal ideas." An equally enthusiastic Justice O'Connor is quoted as stating that "We certainly are going to be more inclined to look at decisions of that court on substantive issues . . . and perhaps use them in future decisions."

The European Court of Justice is based in Luxembourg and was established in 1958 to interpret and apply European Community law. The court has jurisdiction over actions brought by the European Commission against member states with regard to implementing EU law (the EU directive on Data Protection is an example of such legislation) and claims by member states against EU institutions (over trade regulations, for example). In addition, the court may answer questions from national courts on EU law and, where provided by EU law, may hear cases brought directly by individuals.

British Plaintiff Suing American ISPs in London

The extent to which insulting exchanges on the Internet may be defamatory and whether American Internet service providers (ISPs) will be treated as publishers in defamation suits brought abroad, are two questions likely to arise in cases underway in England, a jurisdiction well-known for its stringent libel laws.

Dr. Laurence Godfrey, a British physicist, is currently pursuing two actions against American ISPs in London courts. Godfrey is not only an active participant in various newsgroups, he is also an extremely litigious one, often provoking heated comments he then sues over. He is credited with bringing the first Internet libel case in Britain, *Godfrey v. Hallam-Baker*, suing a Geneva-based physicist in 1993 for alleged defamatory comments posted in an Internet newsgroup questioning Godfrey's professional competence. The case settled out of court. Godfrey has also settled Internet-based claims against New Zealand Telecom, Melbourne PC Users Group, and the Toronto Star and others. Currently pending is a suit by Godfrey against Britain's largest ISP, Demon Internet.

Godfrey v. Cornell

The first of Godfrey's cases against an American ISP arises out of an exchange of insulting messages in soc.culture.canada, a Cornell University newsgroup devoted to all things Canadian. According to a Canadian newspaper report, Godfrey posted a message saying "Canadians are a boring lot and their lacklustre country will never amount to anything." *The Globe and Mail* 6/11/98 at A7. Michael Dolenga, a Cornell graduate student from Canada, responded by "flaming" Godfrey -- that is sending insulting messages in response. Apparently due to Godfrey's well-established litigiousness, news reports of this action do not repeat the alleged defamation.

In addition to suing Dolenga, who did not defend the suit in London and had a default judgment entered against him, Godfrey is suing Cornell University, the computer host of the newsgroup, accusing Cornell of being the "publisher" of Dolenga's alleged defamatory messages. Cornell University is defending the suit in London.

Godfrey v. University of Minnesota

Godfrey's second defamation suit is against the University of Minnesota, Minneapolis ISP StarNet and a former University of Minnesota student. This case arises out of exchanges made in the newsgroup soc.culture.thai. Again, Godfrey claims that a student's posting defamed him and he is asserting claims of publisher liability against the ISPs that hosted or carried the newsgroup. The University of Minnesota has moved to have the case dismissed on forum non conveniens grounds. A hearing in London is scheduled for July 29, 1998.

Not only do these cases highlight the risks faced by American ISPs on claims brought in foreign jurisdictions, they also highlight the unsettled state of the law in Britain with regard to the liability of ISPs for statements posted by third parties. Neither of Godfrey's claims would be viable in the U.S. under Section 230 of the Communications Decency Act which exempts ISPs from publisher liability. In Britain, however, no statute or decision has yet addressed this question. Though ISPs may be able to raise an innocent dissemination defense under English libel law, they may nevertheless be subject to publisher and distributor liability for third party content if the ISP receives actual or constructive notice of allegedly defamatory material.

Thus, rough times may be ahead for ISPs in Britain. Media lawyer Mark Stephens -- himself involved in several Godfrey suits -- predicts that plaintiffs may file claims against ISPs as a backdoor form of censorship against critical commentary on the Internet. By filing or threatening to file suit, plaintiffs may be able to pressure ISPs into removing postings or shutting down Web sites rather than face an uncertain result in the courtroom.

Dow Jones Wins Forum Non Conveniens Motion in London

In another victory by a U.S. publication in a London court, a libel suit by two Americans brought in London against Dow Jones and one of its New York-based reporters was dismissed on forum non conveniens grounds. *Chadha and Osicom Technologies v. Dow Jones & Company*, 1997 C. No. 1710 (July 1998) (Popplewell, J.). Setting aside a Master's decision granting plaintiff leave to serve defendant in the U.S., the high court found that it "would be wholly inappropriate for the case to be tried in the United Kingdom rather than in the U.S."

The libel complaint was based on a Barron's article entitled "Buyer beware -- Dizzying deals raise questions about California's fast growing Osicom Technologies." The article set out in detail a series of transactions engaged in by several American businessmen and companies, including Parvinder Chadha and Osicom Technologies, where Chadha serves as CEO. Many of the transactions were being investigated by securities regulators or were the subject of civil litigation. Although some of the transactions had connections to the UK, including a sale of a UK subsidiary in exchange for cash and stock, and the complaint focused on these connections, the court ultimately concluded that the main thrust of the article was about fraudulent business affairs in the U.S.

Barron's has a small circulation in the U.K.; therefore, there was no question that the Court had jurisdiction over the case.

Burden of Proof on Forum Motion

In what is probably the most important lesson of this case for a U.S.-based publisher, the court first held that the plaintiff bore the burden of proving that England was the appropriate forum for the case because the plaintiffs had sought leave to serve their writ on Dow Jones outside of the UK. Dow Jones had refused to accept service of the writ within the UK and therefore the plaintiff had last December sought and obtained leave *ex parte* from a magistrate in London to serve Dow Jones at its New York headquarters.The Court held that where the plaintiff asks a court to exercise its discretionary power to permit service abroad, it is plaintiff's burden to show that England is the most appropriate forum to try the action.

While the Court ultimately indicated that regardless of the burden it was clear this case did not belong in England, in many cases, the critical issue might very well be --and in some earlier cases arguably was -- whether the foreign defendant had accepted service rather than forcing its opponent to seek leave to serve outside of the U.K.

Factors Considered

Next the court analyzed the various facts to be weighed in determining whether London was the more appropriate forum, including plaintiffs' personal and business connections to the UK, the status of defendant, the extent of publication in the UK, the nature of the publication, and the legal advantages and disadvantages of both jurisdictions.

Among other things, the court found that Mr. Chadha's personal connections to the UK -- consisting of frequent visits and hotel stays prior to 1996 -- were "tenuous." The corporate plaintiff's connection to the UK was likewise discounted. Although it claimed to have something of a presence in the UK -- a three-employee company serving as "a key strategic link to the UK and European market" -- the court treated this characterization with scepticism. This was reinforced by plaintiff's failure to produce meaningful financial records showing the actual extent of this company's business in the UK.

The court took note that Dow Jones is not registered in the UK, nor does Barron's have journalists or full-time advertising executives in the UK. Total sales of the Barrons issue was 294,346; of this total only 1,257 copies were sold in the UK. The court described Barrons as "undoubtedly all American." As to the substance of

(Continued on page 28)

Dow Jones Wins Forum Non Conveniens Motion in London

(Continued from page 27)

the article, one of the possible securities law violations arose out of Osicom's 1992 sale of its UK subsidiary. Although plaintiffs emphasized UK connections to the alleged fraud -- such as subsequent sales of shares in London and use of London banks -- the court concluded that the fraud allegations relate to U.S. plaintiffs and their U.S. business activities. The UK connections were merely incidental.

The final examination by the court was of the relevant merits of the two jurisdictions, especially with regard to the availability of "the Sullivan defence" in America. The court considered competing affidavits from U.S. lawyers on this issue. Plaintiff's American lawyer opined that if tried in the U.S., plaintiff may lose on summary judgment for failure to show actual malice. Defendant's affidavit, by Laura Handman, was described by the court as "less gloomy on this point." In fact, Dow Jones argued that prepublication complaints by plaintiff and his attorneys to Dow Jones over the alleged falsity of the article might well preclude summary judgment on actual malice in a U.S. action. (In fact, at the hearing on this motion there was the bizarre -- for American lawyers' ears -- spectacle of a libel plaintiff's counsel arguing that his clients were certainly public figures who could not possibly prove actual malice and the publisher defendant's lawyer saying that maybe that's all not so clear.)

Although finding that there was an advantage for plaintiff to bring the case in London, thereby avoiding Sullivan, the court found that the access to documents and witnesses in the U.S. made it plainly the more convenient and cheaper jurisdiction for the action. Thus, in conclusion, the court noted that in considering all factors, there was an overwhelming case for the trial to be in the U.S.

LINFORD COMES UP SHORT IN LONDON

SETTLES AT NET LOSS

Distributor Liability Issue Will Have to Await Another Case

The jury trial in a recent London libel case had British newspapers howling with delight over a question posed by the 70 year old presiding judge. The bewildered judge was compelled to interrupt the testimony of the plaintiff, former Olympic gold medalist Linford Christie, to ask for the meaning of the term,"Linford's Lunch Box." Christie explained to the judge, Mr. Justice Popplewell, that Linford's Lunch Box was a label describing his genitals, a description that, in Christie's view, had been rudely imposed on him by the media. Christie then began to whine that he was the victim of sexist treatment, because "no one ever mentions *Sally Gunnell's tits,*" and even began to describe the size of the Lunch Box, until the judge insisted that the trial move on.

The trial was the first of three actions brought by Christie based on an article published by the now defunct magazine, Spiked. Christie alleged that he was libelled by an article entitled "How did Linford get this good?" which suggested that Christie's success as a thirtysomething sprinter was due to performance-enhancing drugs. In addition to suing author John McVicar, a former armed robber turned journalist, Christie also sued the printer and magazine distributors.

Impecunious Author Found Liable

The three cases were to be tried separately but by the same jury. In the first case, which was against author John McVicar, the jury was to decide the meaning of the article, and whether author McVicar had met his burden of proof in showing that this meaning was true. Christie claimed the article meant that he was a cheat. The author argued that it meant only that suspicious circumstances indicated that he had cheated.

On July 3, the jury returned a verdict agreeing with Christie as to the meaning, finding the article meant that "Linford Christie is a cheat who regularly used performancing enhancing drugs." They also found that author McVicar failed to prove that Christie was indeed a cheat. But from a financial standpoint, this first victory was hollow: McVicar, who was without legal representation throughout much of the trial, apparently was unable to retain the fruits of his first profession and is an unlikely candidate to pay any damages to Christie.

Distributors and Innocent Disseminaton

Armed with a jury finding that the article was false and libelous, Christie was scheduled immediately to begin the second trial against deeper pockets, the wholesale distributor defendants, Johnsons News Ltd and W.H. Smith. The distributors had agreed to be bound by the meaning found by the jury in the first trial, and had declined to participate in McVicar's attempt to prove the truth of the libel. They would be liable for the article unless they could establish the defense of "innocent dissemination" which requires that distributors show the following:

1. that they did not know the publication contained the libel complained of;

2. that they did not know the magazine was of a character likely to contain an actionable libel; and

3. that such lack of knowledge was not due to any negligence on their part.

A Settlement to Defendant's Benefit

At this point, however, Christie got cold feet and asked for a break to try to settle with the remaining defendants. A few hours later all of the cases had ended, and the final result was that Christie was going to suffer a net loss.

This result was due to an interesting English rule that allows defendants to protect themselves against ambitious plaintiffs by making payment of a reasonable settlement amount into the court early in an action. Neither the judge nor the jury is aware that the payment is made.

If the plaintiff takes the settlement, the plaintiff is enti-

(Continued on page 30)

LINFORD COMES UP SHORT IN LONDON

(Continued from page 29)

tled to his costs (which include attorneys fees) up to the date the payment in was made. If the plaintiff does not accept the payment and the jury award is less or equal to the amount paid in, then the plaintiff is ordered to pay the costs of the paying party. If the plaintiff holds off, but then accepts the settlement amount later in the proceedings, he can still get the settlement amount, and his costs up to the date of the original pay in - but the plaintiff must pay the costs of the defendant incurred after the date of the pay in.

In the settlement that was reached in the Christie case, Christie had accepted the amounts that had been paid into the court and resolved all issues relating to costs with the defendants, with the exception of distributor Johnsons News. Johnsons had paid £2,500 into the court in October 1997. Christie had finally accepted this amount when he settled with the other defendants and, as a result, he ended up having to pay all of Johnsons' costs incurred after October 1997. The amount due to Johnsons plus his own legal costs will ensure that, in spite of the settlement payments made by the other defendants, Christie would come out in the hole.

Plaintiff Knew Defendant Had Its Proof

At the end of the day, it was Johnsons' chairman and lawyers who were sipping champagne and claiming victory. All because they had the wisdom to make a small payment into court early in the action and then refused to agree to any settlement that did not give it the benefit of that wager.

Johnsons' solicitor was Mark Stephens of Stephens Innocent, and its counsel at trial was Geoffrey Robertson QC. LDRC members who attended the London conference in May will remember that Stephens chaired the Redcoats' side of the conference, and Robertson gave the opening speech. Conference attendees may also be familiar with the judge in the Christie case, Judge Mr. Justice Popplewell, who also joined the conference.

Stephens attributes Johnsons' success to several factors. The evidence that Johnsons was prepared to present under its "innocent dissemination" defense made it clear that Johnsons had no knowledge that the magazine contained the complained-of libel. Johnsons also had to show that it did not know that Spiked, a satircal magazine, was of a character likely to contain a libel. Johnson's evidence on this point was that it had justifiably relied upon the third party distributor, who had the responsibility to ensure the magazine was free from actionable libel. Also, Johnsons had been assured that the magazine would be read by an eminent libel lawyer and it believed any potentially defamatory material would have been excised.

The third element of the defense was that "such want of knowledge was not due to negligence" on Johnsons' part. Johnsons was prepared to show that it reasonably relied upon the representations of the third party distributor, and that it would have been physically impossible for it to review the contents of each of the magazines it distributed.

Because the legal arguments and evidence are all put in writing and given to the plaintiff, Christie was aware of the fact that he could lose his action against the distributors. And that would mean that Christie would be liable to them for all of their costs.

Another factor may have been the jury itself. Its verdict in the first trial was not unanimous - two of the twelve jurors did not believe the article was false. If Christie had failed to gain their overwhelming support regarding his claims against the author of the article, who was without counsel at trial, it would be difficult to get ten of them to decide against the distributors, who had no involvement with the content of the magazine or article.

Julie Ford, of the firm George, Donaldson & Ford, L.L.P. in Austin, TX, is on sabbatical in London.

POLL REPORTING RESTRICTIONS INVALID - CANADIAN HIGH COURT

By Roger D. McConchie

In a modest vote of confidence in the Canadian electorate, the Supreme Court of Canada has struck down a provision in a federal statute which prohibits the broadcasting, publication or dissemination of opinion poll results during the final three days of a federal election campaign. A sharply divided Court (5-3) held that the 72 hour blackout on poll reporting prescribed by s. 322.1 of the *Canada Elections Act* is an unreasonable limitation on the constitutional guarantee of freedom of expression contained in section 2(b) of the *Canadian Charter of Rights and Freedoms*. [*Thomson Newspapers Company Limited et al v. Canada (Attorney General) et al*, 29 May 1998, File No. 25593.]

Trust the Voters

The majority judgment was written by Justice Michel Bastarache, elevated to the Supreme Court only last year, who reasoned that Canadian voters "must be presumed to have a certain degree of maturity and intelligence" and that the Court could not assume such voters would be "so naive as to forget the issues and interests which motivate them to vote for a particular candidate." Joined by four senior members of the Court-Justices Cory, McLachlin, Iacobucci, and Major - Justice Bastarache articulated profound trust in the average citizen's ability to discern unreliable information: "I cannot accept, without gravely insulting the Canadian voter, that there is any likelihood that an individual would be so enthralled by a particular poll result as to allow his or her electoral judgment to be ruled by it."

The minority -all three members of the Court who are appointed from the Bar of Quebec - thought that Parliament had correctly assessed the inability of the average voter to discount last minute polling information. Justice Gonthier, writing for himself as well as Chief Justice Lamer and Justice L'Heureux-Dube J., warned: "Each citizen, no matter how politically knowledgeable one may be, has his or her own reasons to vote for a particular candidate and the value of any of these reasons should not be undermined by misinformation." Noting that the actual impact of public opinion polls continues to be a matter of controversy, Justice Gonthier expressed concern about several potential effects of this "misinformation": (1) the bandwagon effect (electors rally to support the candidate leading in the polls); (2)the underdog effect (electors rally to support the candidate trailing in the polls); (3) the demotivating effect (electors abstain from voting out of certainty their candidate will win); (4) the strategic effect (electors decide how to vote on the basis of the relative popularity of the parties according to the polls; and (5) the free-will effect (electors vote to prove the polls wrong).

Little Emphasis on Free Speech

Both the majority and minority judgments emphasize the community interest in preserving the integrity of the electoral process and pay little real attention to the importance of nurturing the individual's interest in liberty of expression. The entire Court accepted the federal government's argument that inaccurate polls are undesirable and even the majority conceded that Parliament was entitled to legislate some form of remedy. In this case, the majority considered it should give little deference to Parliament's choice of remedy in part because the government had offered no evidence that pollsters will systematically attempt to manipulate the electorate and in part because opinion polls, albeit protected expression and an important part of political discourse, are not the same as political ideas and are not intended to convey a persuasive message. In other words, neutral expression is entitled to greater constitutional protection than partisan expression.

In a number of lengthy judgments in the 1980's, the Supreme Court of Canada established a method of analysis to be used in determining whether a *Charter* right such as freedom of expression invalidates government legislation. The "proportionality" step in the analysis requires the government to show the legislation is carefully designed, or rationally connected to, the objective; that it impairs the right or freedom as little as possible; and that there is a proportionality between its beneficial and negative effects.

The Supreme Court concluded that s. 322.1 of the *Canada Elections Act* failed the proportionality test because there were more effective and less intrusive ways than a total blackout to guard against the distorting effect

(Continued on page 32)

POLL REPORTING RESTRICTIONS INVALID - CANADIAN HIGH COURT

(Continued from page 31)

of inaccurate opinion polls released too close to election day for adequate criticism or correction.

The Court referred with clear approval to the *Election Act* of the Province of British Columbia which requires the disclosure of methodological information but does not mandate a publication ban. Under that statute, anyone who first publishes the results of an election poll during an election campaign for the Legislative Assembly of British Columbia must also simultaneously publish: (a) the name of the sponsor of the poll; (b) the name of the individual or organization who conducted the poll; (c) the dates when the poll was conducted; (d) to the extent that the information is applicable to the poll, the number of individuals contacted for the poll and the percentage of those who refused to take part in the poll; (e) to the extent that the information is applicable to the poll, the margin of error for the poll; (f) the exact wording of each question for which data are reported; (g) for each question for which the margin of error is greater than that reported for the whole poll, the margin of error for the question; (h) a mailing address or telephone number, indicating it as the address or telephone number at which the sponsor can be contacted to obtain a written report regarding the poll in accordance with subsection.

Dissent Would Defer to Parliament

Oddly comforted by the fact the poll reporting ban in the federal elections statute passed "without expressed opposition" in Parliament, the dissenting justices felt the Supreme Court should give greater deference to Parliament's choice of remedies on the basis that the democratically-elected representatives were in the best position to assess the effects of polls in electoral campaigns and their impact on individual voters. Complaining that polls tend to pre-empt the discussion of issues and short-circuit the democratic process, the dissenters gave minor lip service to the importance of freedom of expression before betraying their suspicion of commercial speech by stating that the *Canadian Charter of Rights and Freedoms* "should not be made to serve substantial commercial interests in publishing opinion poll results, by defeating a reasonable attempt by Parliament to allay potential distortion of voter choice."

Less Confidence in Partisan Speech

Where political speech conveys a partisan message, the Supreme Court of Canada has reported less confidence in the ability of the average voter to rationally weigh competing positions. In *Libman v. Quebec* (Attorney General), [1997] 3 S.C.R. 569, a case which dealt with advertising limitations in Quebec's *Referendum Act*, the Supreme Court of Canada unanimously expressed the view that election spending should be limited to promote fairness as a fundamental value of democracy and that such limits should apply not only to advertising expenses incurred by political parties and candidates, but also those incurred by independent individuals and groups unrelated to the parties and candidates. In fact, the Court held the average voter should have second-rate speech rights during an election campaign: "While we recognize their right to participate in the electoral process, independent individuals and groups cannot be allowed the same spending limits [as candidates or political parties]. Although what they have to say is important, it is the candidates and political parties that are running for election. Limits on independent spending must therefore be lower than those imposed on candidates or political parties."

Despite Justice Bastarache's rhetoric in *Thomson Newspapers* in praise of the maturity and intelligence of the Canadian electorate, his judgment again signals the Supreme Court of Canada's paternalistic willingness to uphold legislation which restricts partisan political speech to assure equal opportunity for competing political views. Reiterating the principal theme in *Libman*, Justice Bastarache noted without any apparent qualms that the Supreme Court of Canada was properly concerned in Libman about the "likelihood that the genre of paid advertising would significantly manipulate the political discourse to the advantage of those with greater financial resources." In Canada, it would seem that speech expressing a political viewpoint will be more vulnerable to restriction than speech which is neutral in the sense it does not seek to persuade or convey a political idea.

The case is available on the Web at: www.droit.umontreal.ca/doc/csc-scc/en/html/thomson4.en.html.

Roger D. McConchie is with the firm Ladner Downs in Vancouver, British Columbia.

UPDATE ON ACCESS TO JUDICIAL PROCEEDINGS RELATING TO LEWINSKY GRAND JURY

Supreme Court Review Sought

On June 3, 1998, a consortium of news organizations filed a Petition For A Writ Of Certiorari in the U.S. Supreme Court, seeking Supreme Court review of the May 5, 1998 decision of the D.C. Circuit in In re Motion of Dow Jones & Company, Inc., et al., No. 98-3033. See *LDRC LibelLetter, May 1998, p. 27.* The question presented by the Petition is whether the D.C. Circuit erred in ruling that the press and public had no First Amendment right of access to hearings conducted by Chief Judge Norma Holloway Johnson on issues ancillary to the ongoing grand jury investigation, including hearings on the President's assertions of executive privilege and attorney-client privilege.

The Petition argues that Supreme Court review is appropriate because of a split in lower court decisions concerning the proper test for determining when the First Amendment right of access attaches to a particular judicial proceeding. In particular, the Petition argues that a split exists concerning whether evidence of a history of openness of a particular type of judicial proceeding is a necessary prerequisite to a finding that the First Amendment right of access applies to that type of proceeding.

The Petition also argues that the history of openness of judicial proceedings ancillary to grand jury investigations -- dating back to the famous 1807 proceedings before Chief Justice John Marshall that culminated in the trials of Aaron Burr, and including the open hearings held by Chief Judge Sirica ancillary to the Nixon grand jury investigation -- is sufficient to require recognition of a First Amendment right of access to such proceedings.

The majority of the respondents to the Petition -- including Independent Counsel Starr, President Clinton, Monica Lewinsky, and Francis D. Carter -- did not file briefs in opposition.

However, the Office of the President of the United States (referring to itself as the "White House" did file an opposition.

Other Developments

On May 27, 1998, Chief Judge Johnson unsealed redacted versions of briefs and transcripts relating to the assertions of executive privilege and attorney client privilege made by Bruce Lindsey and others in response to subpoenas issued by the Lewinsky grand jury. In doing so, Chief Judge Johnson relied upon the portions of the D.C. Circuit's opinion in In re Motion of Dow Jones & Company, Inc., et al., No. 98-3033, interpreting Rule 6(e) of the Federal Rules of Criminal Procedure. The Circuit Court ruled that Rule 6(e) contemplates that there be public access to material that does not risk disclosing grand jury matters.

On July 2, 1998, the media consortium filed another motion for access, this time seeking access to a reported motion to compel filed by Independent Counsel Starr. The motion to compel reportedly seeks documents or testimony from Terry Lenzner and the Investigative Group, Inc., private investigators hired by the President's lawyers in connection with the defense of the Paula Jones lawsuit. That access motion remains pending.

LDRC would like to thank the following summer interns for their contributions to this month's *LibelLetter*:

Beth Gunn, Columbia University Law School

Harris Hartman, University of Michigan Law School

Amy Tridgell, Columbia University Law School

Jones v. Clinton: Media Efforts to Obtain Access

By Robert B. Hoemeke

On October 30 1997, Judge Susan Wright in the United States District Court for the Eastern District of Arkansas (Western Division, Little Rock) entered a closure order captioned "Confidentiality Order on Consent of All Parties."

The order recited that the Court and all parties agreed there had been and would continue to be "intense media interest" in the proceedings. It further stated that all agreed that the intense pre-trial publicity would prejudice the ability of the parties to obtain a fair trial. The Court's order prohibited disclosure "directly or indirectly" of: (i) the time and place of any depositions and the identity of any party being deposed; (ii) the content or description of depositions; and (iii) the content or description of other discovery materials. Finally, the order provided that all filings dealing with discovery matters would be filed under seal, and the parties were not to publicly disclose such filings. "Fair trial" consideration was the only reason given for closure.

Media Intervenes

On February 4, 1998, the following media entities sought to intervene for the purpose of moving the trial court to rescind the October 30, 1997 closure order: Pulitzer Publishing Company; The New York Times Company; Associated Press, USA Today, a division of Gannett Satellite Information Network, Inc.; Cable News Network, Inc.; Newsday, Inc.; National Broadcasting Company, Inc.; CBS Inc.; American Broadcasting Companies, Inc.; Time Inc.; Little Rock Newspapers, Inc.; Fox News Network, L.L.C.; The Society for Professional Journalists; and Reporters Committee for Freedom of the Press. The media argued there was a presumptive common law and First Amendment right to court records. *Webster Groves School District v. Pulitzer Publishing Co.*, 898 F.2d 1371, 1375 (8th Cir. 1990); *Publicker Industries v. Cohen*, 733 F.2d 1059, 1071 (3rd Cir. 1984); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 580, n.17.

Different standards of review applied to different aspects of the October 30 Order. However, the media entities pointed out the objective of these different standards of review was the same -- to promote the public's understanding of the judicial system, not to restrict it. Court proceedings and pleadings should only be sealed when a "compelling governmental reason exists and there are no less restrictive alternatives." Additionally, it was argued that discovery material may only be sealed upon "good cause" -- that is only if a specific demonstration can be made that a defined injury would occur on disclosure. Rule 26(c) Fed. R. Civ. P.; *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984). "Good cause" does not exist simply because the litigants want to keep the material closed. The determination of whether "good cause" exists must be balanced against the long-established traditions which value public access to court proceedings. *Proctor & Gamble Co. v. Banker's Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996).

Finally, the media entities argued that the "gag order" on the litigants constituted a "prior restraint" and as such was subject to a heightened scrutiny. Some courts have applied a vigorous examination applicable to prior restraints, even if the parties have not challenged the order. *See e.g. CBS v. Young*, 522 F.2d 234 (6th Cir. 1975). Others have not gone as far, but have held such an order must be justified by a compelling governmental interest. *Application of Dow Jones & Co., Inc.*, 842 F.2d 603, 609; *In re New York Times Co.*, 878 F.2d 67, 68 (2nd Cir. 1989).

Opposition Based On Fair Trial Concerns

Applying these standards it was argued that the October 30 Order should be rescinded. Only one reason was articulated for the imposition of the broad closure order -- fair trial rights of the litigants. The Court assumed that a fair trial could not be accomplished if there were extensive publicity about the litigation. However, highly publicized cases indicate that most jurors are untainted even by widespread publicity. *Welsh v. City and County of San Francisco*, 887 F.Supp. 1293 (N.D.Col. 1995); *Seattle Times v. United States District Court for the Western District of Washington*, 845 F.2d 1513 (9th Cir. 1988); *United States v. Meyers*, 635 F.2d 945 (2nd Cir. 1980).

Paula Jones did not respond to the media's motion. The President opposed the motion. The President argued that the parties had agreed that the court files needed to be sealed

(Continued on page 35)

Jones v. Clinton: Media Efforts to Obtain Access

(Continued from page 34)

to insure a fair trial and that the overwhelming publicity about the proceedings would prevent the parties from obtaining an "untainted jury." It was also agreed by the litigants that the materials should remain sealed because "the interest of having the President carry out his official duties without undue disruption could be impaired through disclosure of discovery materials." To this point the President had not raised any considerations of witness privacy.

On March 9, 1998, the Court denied the media's motion. Of interest is the opening sentence of the Court's Memorandum and Order:

> Faced with intense and often inaccurate media coverage of virtually every aspect of this civil case, this Court, on October 30, 1997, entered a Confidentiality Order on Consent of all Parties ("Order"), thereby imposing limits on the dissemination of information concerning a large portion of discovery and placing under seal court filings dealing with discovery.

The Court relied almost exclusively on *Seattle Times Co.* in upholding her prior order. The Court again reiterated her concern for a fair trial. In so doing she stated that:

> The media has increasingly shown a callous disregard of the right of the parties to a fair trial. Moreover, the movants 'antidote' for curing their own misreporting assumes that any information that is unsealed would be accurately reported, an assumption the court simply is not willing to make given the previous reporting of materials that are not under seal.

Deponent Privacy Concerns

For the first time the Court then raised the privacy interests of third party deponents. She stated this interest was sufficient to satisfy the "good cause" requirements of Rule 26(c).

Movants filed their Notice of Appeal on March 11, 1998. At the same time the media filed a motion for expedited appeal in the Eighth Circuit. Before the motion for expedited appeal was acted upon the trial court granted the defendants' motion for summary judgment. As a result of the summary judgment, the Eighth Circuit entered the following order on April 15, 1998:

> Appellants, in an appeal filed prior to the District Court's grant of summary judgment to the defendants, seek to unseal the pleadings and discovery in *Jones v. Clinton and Ferguson*, No. LR-C-94-290. In view of the grant of summary judgment, we remand the case to the District Court and request that court to consider the need for keeping its confidentiality order in place. Given this disposition, we do not reach the merits of the appeal.

The media then by letter requested Judge Wright to reconsider her order of March 9, 1998. The Court informally advised counsel for the parties that she would review her order after she received the mandate from the Eighth Circuit.

Shortly after the mandate was issued by the Eighth Circuit, Judge Wright on June 8, 1998, entered an order which began:

> Faced with intense and often inaccurate media coverage of virtually every aspect of this civil case, this Court, on October 30, 1997, entered a Confidentiality Order on Consent of all Parties ("Order"), thereby imposing limits on the dissemination of information concerning a large portion of discovery and placing under seal court filings dealing with discovery.

The Court then directed all parties to submit briefs by June 19, 1998. The Court stated in the order that she was particularly interested in the parties' addressing the Court's conclusion "that protecting the privacy interests of individuals who might be the subject of intrusive and embarrassing discovery is 'good cause' under Fed. R. Civ. P. 26(c) for maintaining the confidentiality order."

The President, Paula Jones and the media filed briefs as requested. Paula Jones argued the files should all be opened, but only after the case is tried before a jury or the summary judgment is affirmed. The President argued that the confidentiality order should remain in place. The President reiterated concern about receiving a fair trial if the summary judgment were reversed. Given the pervasive nature of the reporting on

(Continued on page 36)

Jones v. Clinton: Media Efforts to Obtain Access

(Continued from page 35)

this litigation, the President stated that even with the lapse of time before a jury trial would take place, an untainted jury panel could not be found.

The President also argued the order should remain in place to protect the identity of the "Jane Does." Apparently, there had been some agreement that the identity of certain deposed parties would be protected by the use of the designation "Jane Doe" in court documents. Additionally, the President cited *Seattle Times Co.* and *United States v. McDougal*, 103 F.3d 651 (8th Cir. 1996); *United States v. Webbe*, 791F.2d 103 (8th Cir. 1986); and *Tavoulareas v. Washington Post Co.*, 111 F.R.D. 653 (D.D.C. 1986). *McDougal* affirmed the trial court's decision to keep a video tape of the President sealed when a transcript of the tape was publicly available; in *Webbe*, the Eighth Circuit would not make audio wire taps available when the transcripts were available, in *Tavoulareas* Mobil Oil successfully retained a closure order regarding certain of its business practices when such materials had been submitted under a protective order.

Media Response

The media argued that even if there were ultimately a jury trial the lapse of time and other techniques could allow a jury untainted by pretrial publicity to be selected. The media also argued that if necessary the identity of witnesses could be redacted from the materials released.

Since the closure order deals primarily with depositions and other discovery material, the media pointed out that the discovery process is the battleground where civil suits are won or lost. It is in discovery that the facts are developed. Sometimes, as the court found here, discovery leads to a conclusion that there are no disputed issues of material fact, and the lawsuit ends in summary judgment. Because of this central role played by the discovery process there is a presumption that discovery material should be open as well. *Avirgan v. Hall*, 118 F.R.D. 252, 255 (D.D.C. 1987); *see also Koster v. Chase Manhattan Bank*, 93 F.R.D. 471, 481 (S.D.N.Y. 1982).

Trial Court Reconsiders

On June 30, 1998, the trial court vacated her order of October 30, 1998, stating:

> In sum, the Court vacates the Confidentiality Order as to those matters which do not reveal the identities of any Jane Does and hereby unseals the record in this matter. The Confidentiality Order shall remain in effect with respect to the identities of any Jane Does who may be revealed in the Court record, in any material sin possession of the parties that have not been filed of record, and in any public statements. In addition, all video tapes of depositions taken in connection with this lawsuit shall remain under seal. The parties shall have until and including July 10, 1998, in which to file a notice of appeal from today's decision and to ask that today's decision be stayed pending appeal. If no notice of appeal and motion to stay is filed within that time, the Court will proceed to unseal the record in a manner consistent with today's Memorandum and Order.

On July 8, 1998, the President filed a motion for reconsideration of the June 30 Order. Upon receipt of this motion the trial court stayed her June 30, 1998 Order and stated that pursuant to local rules the parties had 14 days to respond to the President's reconsideration motion.

The President's reconsideration motion substantially restated his position set out in his brief of June 14, 1998. The President added that the Court's June 30 Order presented practical administrative problems, particularly the manner in which to protect the identity of the Jane Does.

Citing *Seattle Times Co.*, the President argued that " . . . the media and others could improperly use the fruits of the Court's compulsory processes and court records for profit and political gain." In this regard the President stated that "Given the media's desperate need for 'news' under the demands of today's 24-hour news cycle and cable television shows, any additional unsealing could result in ten-hours-a-day of reporting, mis-reporting and displaying of unsealed material." The brief goes on to describe the anticipated pervasive news coverage as a "media circus" making a mockery of the judicial system. . ."

The media intend to respond to the reconsideration motion.

Robert B. Hoemeke is with the firm Lewis, Rice & Fingersh, L.C. in St. Louis, Missouri.

STATE REGULATION THAT PROHIBITS THE RELEASE OF PUBLIC INFORMATION FOR COMMERCIAL PURPOSES VIOLATES THE FIRST AMENDMENT

By Guylyn R. Cummins

Last month, the Ninth Circuit Court of Appeal joined the Eleventh Circuit and several district courts in holding that state regulations which prohibit the release of public information for commercial purposes violate the First Amendment. In *United Reporting Publishing Corp.* v. *California Highway Patrol*, 1998 U.S. App. LEXIS 13549, (9th Cir. June 25, 1998), the Court ruled that a California statute precluding the release of such information for commercial purposes did not directly and materially advance the government's asserted interest in protecting the privacy of arrestees. Importantly, the United States District Court for the Southern District of California also noted the ominous possibility that the statute had been passed to prevent arrestees from obtaining competent counsel.

California's Statute

Before July 1, 1996, the California Government Code provided that state and local law enforcement agencies had to make public the full name, current address, and occupation of every individual arrested by the agency. Cal. Gov. Code, § 6254(f). This provision made arrestee addresses available to anyone for any purpose. In an unrelated case, the California Supreme Court had agreed with California's legislature that *it is* in the public interest to identify adults charged with crimes and put other citizens on notice of those arrests. *Loder* v. *Municipal Court*, 553 P.2d 624, 628.) (Cal. 1976). A "suspect's right of privacy is not violated . . . by prompt and accurate public reporting of the facts and circumstances of his arrest" given [the overriding social interest,]" the Court stated.

After successful lobbying efforts by state and local law enforcement agencies and offices of the District Attorneys however, section 6254(f) of the California Government Code was amended to allow arrestee information to be made available only for a "scholarly, journalistic, political, or governmental purpose" or "for investigative purposes by a licensed private investigator[.]" The statute expressly provided in a paternalistic approach that address information "shall not be used directly or indirectly to sell a product or service to any individual or group of individuals, and the requester shall execute a declaration to that effect under penalty of perjury." Cal. Gov. Code, § 6254(f)(3).

United Reporting Publishing Corporation ("United Reporting"), a private publishing service that publishes a small newspaper with articles of interest for arrestees, as well as the names and addresses of recently arrested individuals to its clients, filed a 1983 Act challenge to the statute's constitutionality. 42 U.S.C. § 1982. United Reporting's clients include attorneys, insurance companies, drug and alcohol counselors, religious counselors and driving schools. The 1983 Act claim was filed against numerous sheriff and police departments throughout California after they denied United Reporting access to arrestee information as of July 1, 1996.

The District Court Decision Notes Possible Government Discrimination

The California Highway Patrol, San Diego Sheriff's Department and Los Angeles Police Department were the only three defendants who continued to legally defend the statute as constitutional throughout the lawsuit. All other law enforcement agencies agreed to provide the information pending the outcome of United Reporting's constitutional challenge to the statute. The district court initially granted United Reporting temporary and permanent restraining orders pending the outcome of cross-motions for summary judgment on the validity of the statute.

In entering summary judgment in favor of United Reporting, the district court held that California Government Code section 6254(f)(3) violated the First Amendment. In so ruling, the district court noted the possible *government discrimination* effect of the statute on the Sixth Amendment right to obtain competent counsel: "[I]t was

(Continued on page 38)

STATE REGULATION THAT PROHIBITS THE RELEASE OF PUBLIC INFORMATION FOR COMMERCIAL PURPOSES VIOLATES THE FIRST AMENDMENT

(Continued from page 37)

state and local law enforcement agencies and district attorney's offices which proposed this amendment to § 6254." 946 F.Supp. 828, 829. The statute "may . . . have been intended to prevent arrestees from obtaining counsel because law enforcement agencies find it easier to deal with arrestees who are not represented by counsel." *Id.*

The district court further noted that it is hard to see how direct mail solicitations invade the privacies of arrestees. "If they don't like the solicitation, they can simply throw it away." *Id.*, citing *Bolger* v. *Young's Drug Products Corp.* 463 U.S. 60, 72 (1983). At worst, the court noted, it could only be marginally more embarrassing, if at all, for a "suspected criminal" to receive a letter from an attorney offering services to them, especially given that the addresses under the statute could be published in newspapers, broadcast on television, and obtained by an employer or even an enemy." *Id.*

Only the Los Angeles Police Department appealed the decision.

Ninth Circuit Rejects Non-Commercial Speech Argument

The Ninth Circuit agreed with the district court in striking down the statute. The Court first rejected, however, United Reporting's contention that more than commercial speech was involved given the publication by United Reporting of informative articles for arrestees. (1998 U.S. App. LEXIS at pp. 4-10.) While recognizing the current struggle of the United States Supreme Court justices "on the validity of the distinction between commercial and noncommercial speech[,]" (The Ninth Circuit cited to *44 Liquormart, Inc.* v. *Rhode Island* 116 S.Ct. 1495, 1518 (1996) (Thompson J., concurring,), "I do not see a philosophical or historical basis for asserting that 'commercial' speech is of 'lower value' than 'noncommercial' speech. Indeed, some historical material suggests to the contrary.") the Ninth Circuit felt compelled "under the Supreme Court's current jurisprudence, to afford commercial speech less protection from government regulation that some other forms of expression." (*Id.*, citing *United States* v. *Edge Broadcasting Co.* 509 U.S. 418, 426) (1993).

No Bright Line Test for Defining Commercial Speech

The Ninth Circuit also rejected United Reporting's argument that only speech which "merely proposes a commercial transaction" is commercial speech. Noting that such speech constitutes the "core notion" of commercial speech, the Court found this "core notion" to be the beginning of the inquiry, not the end. 1998 U.S. App. Lexis at pp.4-10. Relying on *Central Hudson Gas and Electric Corporation* v. *Public Service Commission of New York* 447 U.S. 557, 561, (1980) the Court adopted the definition of the United States Supreme Court that commercial speech is any expression "related solely to the economic interests of the speaker and its audience." 447 U.S. at 561. This, the Court found to be "obviously broader than speech which proposes a commercial transaction; people often discuss their economic interests without proposing commercial transactions." *Id.*

While the Ninth Circuit, like the United States Supreme Court, abstained from creating any bright-lined rules, the Court employed a context analysis, ruling that each communication must be examined in the light of surrounding circumstances to determine whether it is entitled to the qualified protection afforded to commercial speech or full First Amendment protection. Because United Reporting sells arrestee information to clients, the Ninth Circuit Court found that its speech can be reduced to "I [United Reporting] will sell you [client] the X [names and addresses of arrestees] at Y price." *Id.* at p. 9. The Court held this is a "pure economic transaction," comfortably within the "core notion" of commercial speech.

Application of Central Hudson

The Ninth Circuit then undertook a *Central Hudson* analysis to see if the statute could survive scrutiny. The Court reiterated the four prongs of the *Central Hudson* test:

(Continued on page 39)

STATE REGULATION THAT PROHIBITS THE RELEASE OF PUBLIC INFORMATION FOR COMMERCIAL PURPOSES VIOLATES THE FIRST AMENDMENT

(Continued from page 38)

> At the outside, (1) we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, (2) we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, (3) we must determine whether the regulation directly advances the governmental interest asserted, and (4) whether it is not more extensive than is necessary to serve that interest.

447 U.S. at 566 (enumeration added).

With respect to the first prong of *Central Hudson*, the parties agreed that United Reporting's speech was neither illegal nor misleading. 1998 U.S. App. Lexis at p. 9. With respect to the second prong, two governmental interests were asserted:

> From a law enforcement perspective, (1) the processing of the request puts a tremendous strain on already scarcely allocated time and resources. [F]rom a consumer perspective, (2) this is an invasion of privacy. While these records are justifiably public in many ways, the unsolicited direct mail advertisements are unwarranted.

Id. However, only the second interest concerned the Court as the Los Angeles Police Department failed to challenge the district court's finding that the asserted governmental interest in minimizing the cost of producing arrestee information to commercial providers could not survive scrutiny.

The Ninth Circuit agreed with the district court that protecting privacy of arrestees is substantial, citing *Carey* v. *Brown* 447 U.S. 455, 471 (1980) (the state's interest in protecting the well-being, tranquillity and privacy of the home is certainly of the highest order in a free and civilized society"). *Id.* at p. 12. The Court then turned to the third prong of *Central Hudson* to determine whether the challenged statute "advances the government's interest 'in a direct and material way.'" *Id.* at p. 12-21, citing *Ruben* v. *Coors Brewing* 514 U.S. 476, 487 (1995).

The Statute Does Not Directly and Materially Advance The Protection of Privacy

The Ninth Circuit again agreed with the district court in finding that the amended statute did not directly and materially advance the government's interest in protecting privacy. The Los Angeles Police Department argued on appeal that a prohibition against the release of arrestee information "reduces the opportunity for commercial interests to create and maintain an unreliable criminal history information bank, which could have the effect of destroying the employment potential of the innocent, the reformed, the pardoned and the young" and prevents the "direct intrusion into the private lives and homes of arrestees and victims." *Id.* at p. 14. The Ninth Circuit noted the Los Angeles Police Department provided no evidence whatsoever in support of this contention, and concluded this asserted harm appeared to be no more than speculation and conjecture. *Id.* at p. 15. Because the Los Angeles Police Department failed to sustain its burden of proving that the harm was real, the Ninth Circuit did not consider whether the restriction would alleviate the asserted harm to a material degree. *Id.*

The second harm asserted by the Los Angeles Police Department -- preventing the "direct intrusion into the private lives and homes of arrestees and victims" -- the Ninth Circuit found more weighty. Still it agreed that the fact that "journalists, academics, curiosity seekers and other non-commercial users" could peruse a report on arrestee records belied the Los Angeles Police Department's claim that the statute was actually intended to protect privacy. *Id.* at p. 16. Instead, the Ninth Circuit noted the statute appeared more directed at preventing solicitation practices. The Ninth Circuit reiterated that privacy of arrestees is not invaded by the *solicitation* itself, but by the solicitor's *discovery* of the information that led to the solicitation. *Id.*, citing *Shapiro* v. *Kentucky Bar Ass'n* 486 U.S. 466 (1989).

For these reasons, the Ninth Circuit held that the

(Continued on page 40)

STATE REGULATION THAT PROHIBITS THE RELEASE OF PUBLIC INFORMATION FOR COMMERCIAL PURPOSES VIOLATES THE FIRST AMENDMENT

(Continued from page 39)

amended statute failed the third prong of the *Central Hudson* test, stating: "The myriad of exceptions to § 6254(f)(3) precludes the statute from directly and materially advancing the government's purported privacy interest." (See *Valley Broadcasting Company*, 107 F.3d at 1334-36, ban on broadcast advertisements for casino gambling violated First Amendment where numerous exceptions to the ban were provided for in the statute).

Conclusion

In striking down the California statute as unconstitutional, the Ninth Circuit aptly concluded: "It is not rational for a statute which purports to advance the governmental interest in protecting the privacy of arrestees to allow the names and addresses of the same to be published in any newspaper, article, or magazine in the country so long as the information is not used for commercial purposes. Having one's name, crime and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney, substance abuse counselor, or driving school eager to help one overcome his present difficulties (for a fee, naturally)." 1998 U.S. App. Lexis at p. 20.

Because the amended statute undermines and counteracts the asserted governmental interest in preserving privacy, it fails to satisfy *Central Hudson* and was properly struck down by the district court as an unconstitutional infringement of United Reporting's First Amendment rights. (NOTE: Because of the First Amendment violation, the Ninth Circuit did not reach United Reporting's equal protection, due process, or overbreadth arguments.)

Guylyn R. Cummins is with the firm Gray Cary Ware & Freidenrich in San Diego, CA., and represented United Reporting Publishing, Corp. in this matter.

(Continued from page 41)

the extent to which the filmed material could be used or re-used either before, during, or in the aftermath of the March. Judge O'Kelley concludes:

> "Dr. King's speech at the March almost epitomizes the definition of a general publication: it was made available to members of the public at large without regard to who they were or what they proposed to do with it [cite omitted] The dissemination justified CBS's belief that Dr. King's speech was dedicated to the public...
>
> [A]s one of the most public and most widely disseminated speeches in history, it could be the poster child for general publications.
>
> Slip op at 14, 16.

The court recognized that there was a seemingly contrary decision rendered in *King v. Mister Maestro, Inc.*, 224 F.Supp. 101 (S.D.N.Y. 1963) in which a preliminary injunction was granted to Dr. King to stop the distribution of phonograph records of the Speech. The court in that decision found that the performance of the Speech did not constitute a "general publication" under the copyright laws. Rather than distinguish the decision -- although the opinion suggests some of the distinctions that could be drawn -- Judge O'Kelley simply notes his disagreement.

The attorney who handled the case for the King Estate, Inc. Joseph Beck, was quoted in The *Atlanta Journal-Constitution* on July 23, the day after the decision was issued, as indicating that it was likely to appeal the decision.

CBS was represented in this matter by Susanna Lowy and Anthony Bongiorno of CBS Law Department, and Floyd Abrams, Cahill Gordon & Reindel, New York.

Martin Luther King, Jr. "I Have a Dream" Speech Held To Be In Public Domain

A Federal District Court for the Northern District of Georgia (Atlanta Division) has held that the totality of circumstances surrounding the delivery of the "I Have a Dream" speech by Martin Luther King, Jr. at the August 28, 1963 March on Washington (the "Speech") constituted a "general publication" for purposes of the Copyright Act of 1909 and resulted in the speech falling into the public domain. *Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, Civil No. 1:96-CV-3052-WCO (July 22, 1998) The holding came in response to cross-motions for summary judgment in the copyright infringement suit brought by the Estate of Martin Luther King, Jr., Inc. against CBS based upon use of a substantial portion of the speech in a civil rights documentary produced by CBS on Dr. King and the March on Washington, distributed by CBS licensee, Arts & Entertainment on videotape as part of an historical documentary series entitled "The 20th Century with Mike Wallace." The district court judge, Judge William C. O'Kelley, granted CBS' motion for summary judgment, denying that of the Estate.

The Historic Speech

As Judge O'Kelley's opinion states, the historic speech was organized by the Southern Christian Leadership Conference, of which Dr. King was then President, and nine other organizations. The Speech was delivered live before approximately 200,000 people and broadcast live by CBS and other television and radio networks and stations. Judge O'Kelley finds the March organizers actively sought press coverage of the event, including Dr. King's Speech. An advance copy of Dr. King's Speech, albeit with variations from the one delivered, was available without copyright notice or expressed limitations at a press tent at the March (the question of whether there was general access to tent being in dispute) in order to facilitate coverage of the speech. In its September newsletter, the SCLC reproduced the speech in its entirety with no copyright notice or restrictions, although it was disputed as to whether that was done with Dr. King's permission or not. On September 30, 1963, Dr. King applied for federal statutory copyright protection for the Speech.

The CBS documentary contained, according to the decision, approximately 60% of Dr. King's speech, much of it heard while photographs and video of the crowd at the March and of scenes illustrating discrimination, as well as of Dr. King giving the speech, were seen. The bulk of the documentary contained CBS footage from other speeches and events during the March, from other speeches and events during the Civil Rights Movement, interviews placing events in historical context, and narration.

Was the Speech Published?

Under the 1909 Act, if an owner of a work did not comply with the statutory requirements for securing federal copyright protection prior to what was considered to be a "general publication," the protection could be lost. The work was deemed to fall into the public domain. While the 1909 Act did not define "publication" for these purposes, the 1976 Act does have a definition of publication and there has been extensive court discussion of the concept. As Judge O'Kelley notes, mere public performance of a work, as a general proposition, is not regarded as a "general publication." But, after Judge O'Kelley engages in a solid discussion of the law of "publication," he concludes that the dissemination of this Speech fell "outside the parameters of the 'performance is not a publication' doctrine." Slip op at 10.

Noting that the size of the audience for the performance would not constitute a basis for finding a general publication, nor would the prominence, importance or newsworthiness of either the speaker or the material, Judge O'Kelley says that the actions of the owners and their attitude toward reproduction of the work is what is critical. When a work is shown to the public without reservations or limitations, when the performance carries with it the right to reproduce and redistribute it, it may be deemed dedicated to the public.

Found to be crucial factors were the efforts of the March organizers, indeed, their express goal, to obtain press coverage and the widest dissemination of the speeches possible. The speeches were broadcast live and re-broadcast and republished. At no point, the court says, was the press given any express limitations regarding who could film the event or

(Continued on page 40)

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NOVEMBER 11, 1998

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INTRODUCTION BY WALTER CRONKITE

IN ADDITION, THERE WILL BE A PANEL OF JOURNALISTS WHO COVERED THE CIVIL RIGHTS MOVEMENT TALKING ABOUT THEIR EXPERIENCES.

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